IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-939

MESCALERO APACHE TRIBE, ET AL.,
SHOSHONE-BANNOCK TRIBES OF THE
FORT HALL RESERVATION, IDAHO, AND
TE-MOAK BANDS OF WESTERN SHOSHONE INDIANS
OF NEVADA, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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January 2, 1976

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners[1] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Claims entered in its consolidated Appeal Nos. 2-74, 10-74 and 12-74 on July 11, 1975 (rehearing denied October 3, 1975), reversing the decision and orders of the Indian Claims Commission holding the

[1]Petitioners are all American Indian tribes. Before the Indian Claims Commission, in Docket Nos. 22-G, 326-C and 326-A, respectively, each sued separately for a general accounting and complained, among other things, of the failure of the government to have made certain of its trust funds productive. The Commission

[Footnote continued]

United States liable, where it had unilaterally taken possession as trustee of certain funds belonging to petitioners, for failing to have made such funds productive for petitioners' benefit.

OPINIONS BELOW

The opinion of the Court of Claims, not yet officially reported, and the opinion and orders of the Indian Claims Commission, reported at 31 Ind. Cl. Comm. 427, 557 and 559,[2] are reproduced respectively as separately bound Appendices A, C and D hereto. The opinion of the Court of Claims is unofficially reported at 518 F.2d 1309.

JURISDICTION

The judgment of the Court of Claims was entered on July 11, 1975. A timely motion for rehearing was denied on October 3, 1975 (App. B), and this petition was filed within 90 days thereafter. Jurisdiction is invoked under 28 U.S.C. §1255(1) and 25 U.S.C. §70s(c).

QUESTION PRESENTED

Where the United States, of its own volition and without the consent of petitioners, took possession as trustee of certain funds constituting proceeds of sales of

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considered and decided Docket Nos. 22-G and 326-A together. Deeming its decision in those cases dispositive of the same issue in Docket No. 326-C, it entered an order of liability therein as well. On appeal by the government to the Court of Claims, the Mescalero case, Appeal No. 2-74, the Shoshone-Bannock case, Appeal No. 10-74, and the Te-Moak case, Appeal No. 12-74, were consolidated and disposed of by a single judgment and opinion. This petition is filed jointly pursuant to Rule 23(5) of this Court.

[2]The order of the Commission in the Shoshone-Bannock case, Docket No. 326-C, is unreported.

products and resources, and of interests in lands, of petitioners' several reservations, which funds were petitioners' private property; and

Where the United States deposited such funds to petitioners' credit in an account in its own Treasury, thereby obtaining the use of such funds for its own benefit;

Whether the United States was obligated either, as trustee, to make such funds productive of income for petitioners' benefit or, as sovereign, to compensate petitioners for the taking of the use thereof, under 31 U.S.C. 547a or other statutes, the common law of trusts, the standards of fair and honorable dealings, or the provision of the Fifth Amendment of the Constitution of the United States that prohibits the taking of private property for public use without just compensation—all as enforceable under the Indian Claims Commission Act.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

(1) Section 2 of the Act of September 11, 1841, 5 Stat. 465 (31 U.S.C. §547a) (App. F(1)).

(2) Section 28 of the Act of May 25, 1918, 40 Stat. 561, 591 (formerly 25 U.S.C. § 162, before replacement by Act of June 24, 1938, 52 Stat. 1037 (25 U.S.C. §162a) (App. F(2)).

(3) Act of March 3, 1883, 22 Stat. 582, 590, as amended and supplemented by Acts of March 2, 1887, 24 Stat. 449, 463, and May 17, 1926, 44 Stat. 560 (25 U.S.C. §155) (App. F(3)).

(4) Acts of February 12, 1929 and June 13, 1930, 45 Stat. 1164 and 46 Stat, 584 (25 U.S.C. §§161a and 161b) (App. F(4)).

(5) Clauses 1, 2 and 5 of section 2 of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1050 (25 U.S.C. §70a) (App. F(5)).

(6) Provision of Fifth Amendment of Constitution that prohibits the taking of private property for public use without just compensation. (App. F(6))

STATEMENT OF THE CASE

In 1883, Congress provided that the "proceeds of all pasturage and sales of timber, coal, or other product of any Indian reservation . . . not the result of the labor of any member of such tribe, shall be covered into the Treasury for the benefit of such tribe under such regulations as the Secretary of the Interior shall prescribe. . . ."[3]

Pursuant to this provision, a trust account (misnamed, "Indian Moneys, Proceeds of Labor") was opened in the Treasury. Into it were deposited in common the miscellaneous revenues (ever since known as IMPL funds) realized by the several tribes, including petitioners, from sales of the products and resources, and of interests in the lands (*e.g.*, grazing leases), of their respective reservations.[4]

As a result of a determination by the Secretary of the Treasury that funds deposited in the IMPL account could not be withdrawn and expended, except upon appropriation by Congress, the 1883 Act was supplemented in

[3]Act of March 3, 1883, 22 Stat. 582, 590 (App. F(3)).

[4]Although, until 1930, the account was operated as the common depository of the IMPL funds of all the tribes, books were kept showing the amounts of money therein belonging to each.

1887 by a provision authorizing the Secretary "to use the money which has been or may hereafter be covered into the Treasury under the provisions of the [1883 Act], and which is carried on the books of [the Department of the Interior] under the caption of 'Indian moneys, proceeds of labor', for the benefit of the several tribes on whose account said money was covered in, in such way and for such purposes as in his discretion he may think best. . . . "[5]

The total balance of all tribes in the common IMPL account was approximately $13,000 in 1885 and $26,000 in 1886. The Commissioner of Indian Affairs reported a balance of more than $150,000 in 1890, and balances ranging between $1,200,000 and$5,400,000 for various years from 1908 to 1929. The Treasury showed steadily mounting balances from 1896 (about $250,000) to 1908 (about $3,500,000), and surpluses, which only once fell below $2,000,000 and ranged as high as $9,000,000, during the period from 1912 to 1930.

At no time during the period from 1883 to 1930 was the United States out of debt. When moneys belonging to the Indian tribes were credited to the IMPL account, they were actually taken into the general fund where they were commingled with receipts from other sources (*e.g.*, taxes and borrowings) and used for general government purposes. Because the United States was never free of debt during the period, if it had not had the use of the Indians' moneys credited to the IMPL account, it would have had to borrow an equal amount from others. Of

[5]Act of March 2, 1887, 24 Stat. 449, 463 (App. F(3)). The 1883 Act was further amended and supplemented by the Act of May 17, 1926, 44 Stat. 560, essentially into the form in which it now appears as 25 U.S.C. §155.

course, it would have had to pay such *sui juris* lenders for the use of their moneys, but it denies that it was under any obligation to make the funds it borrowed without their consent from the Indian tribes, to whom it stood in the relationship of guardian and trustee, productive of returns for their benefit.

The government does not dispute that the moneys covered into the IMPL account were the tribes' private property in the constitutional sense; that the United States took possession of such moneys strictly as trustee; or that the balances shown in the IMPL account from time to time represented funds held in trust by the United States.

Upon separate suits by each of the petitioners under the Indian Claims Commission Act for damages for breach of the obligation to have made such funds productive, or for compensation for the taking of their use, the Commission held that between 1883 and 1930[6] the United States had been obligated to make the funds productive by section 2 of the Act of September 11, 1841, 5 Stat. 464 (App. F(1)), [7] for breach of which it

[6]After 1930 the IMPL account, formerly operated as a common account, was severalized and simple interest at the rate of four percent was paid on balances therein. Acts of February 12, 1929 and June 30, 1930, 45 Stat. 1164 and 46 Stat. 584 (25 U.S.C. §§161a and 161b) (App. F(4)).

[7]Essentially unchanged from the time of its enactment, this provision now appears as 31 U.S.C. §547a as follows:

> All funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall be invested in stocks of the United States, bearing a rate of interest not less than 5 per centum per annum. R.S. §3659.

awarded damages measured by compound interest at the rate of five percent.[8]

On appeal by the government, the Court of Claims *en banc* reversed (Judge Davis dissenting), on the grounds that section 2 of the 1841 Act was not applicable and that to permit the tribes to recover would be to allow interest on a claim against the United States.

The court did not address the tribes' contentions that, apart from the 1841 Act, the United States was obligated under other statutes, the common law of trusts, the standards of fair and honorable dealings, and the Constitution, to have made the funds productive or to pay compensation for the taking of their use—all as enforceable under the Indian Claims Commission Act.[9]

In separate motions for rehearing, petitioners urged the court to consider these alternative sources of obligation. The court denied the motions without opinion. Its complete failure to address the issue of the application of the standards of fair and honorable dealings prompted a further dissent from Judge Davis. He deemed this omission an "extraordinary circumstance" compelling departure from his usual practice of not voting for

[8]In Docket No. 326-A, the Commission denied a separate claim of the Te-Moaks that they were entitled to damages for the failure of the government to have made productive certain sums owed under a treaty but not paid. It also denied their motion for rehearing on this point (App. E), and the Court of Claims affirmed. Review of the judgments below on this point is not sought here.

[9]While holding that it was unnecessary to look beyond the 1841 Act to establish the obligation of the government to have made petitioners' IMPL funds productive, the Commission observed that, independently of such act, a similar obligation would have existed under the common law of trusts, the standards of fair and honorable dealings and the 1918 Act.

reconsideration of opinions simply because he had dissented in the first instance. (App. B)

REASONS FOR GRANTING THE WRIT

On the premise that to permit recovery would be to award interest on a claim against the United States, the court below holds that the government, as trustee, can unilaterally take possession of funds belonging to an Indian tribe, place them in its Treasury and use them for its own purposes, without subjecting itself to any obligation to make them productive for the *cestui's* benefit or to pay compensation for the taking of their use.

The decision below warrants review because it involves important issues respecting not only the historic, but also the contemporaneous obligations of the government when it undertakes to act as trustee of funds belonging to an Indian tribe, and respecting the proper construction of a still vital and essentially uninterpreted statute (31 U.S.C. 547a) that has been on the books for 134 years;[10]

[10] In 1918, Congress ameliorated the strict investment mandate of the 1841 Act by authorizing the Secretary of the Interior to deposit tribal trust funds in banks and to invest them in government bonds generally. It expanded his authority to make such funds productive by investment again in 1938. Section 28 of the Act of May 24, 1918, replaced by Act of June 24, 1938 (App. F(2)).

In 1929-1930, Congress provided for the payment of simple interest at the rate of four percent on tribal funds in the Treasury upon which interest was not otherwise provided. Acts of February 12, 1929, 45 Stat. 1164, and June 13, 1930, 46 Stat. 584 (25 U.S.C. §§161a and 161b) (App. F(4)).

At least since about 1968, the Secretary has been utilizing the authority he possess, currently under the 1938 Act, to invest

[Footnote continued]

because it is in conflict in principle with *Peoria Tribe of Indians v. United States*, 390 U.S. 468 (following *United States v. Blackfeather*, 155 U.S. 180); because of the magnitude of the loss a number of tribes will suffer if it is allowed to stand;[11] and because the result it reaches is grossly unjust and unfair.

The majority opinion below states repeatedly that the 1841 Act did not obligate the government to *pay interest* on tribal moneys deposited in the IMPL account and that, prior to adoption of the 1930 Act, nothing else did either. Petitioners never contended the contrary.

practically all tribal trust funds in his custody in securities returning substantially more than four percent.

The government continues to insist, however, that it would breach no duty owed the tribes if it elected to leave such funds in the Treasury or if, for its own benefit, it elected to invest them in securities producing less returns than would other equally authorized, appropriate and available securities. In short, the government continues to deny, as trustee of Indian funds, that it owes the same duty to make them productive as would any other trustee. *Restatment* (Second) Trusts §181. *See. Cheyenne-Arapaho Tribes v. United States*, 206 Ct. Cl. ___, 512 F.2d 1390 (1975).

[11] The government attempted to frighten the court below by suggesting that upholding the decision of the Commission could expose it to liability amounting to "billions of dollars".

There are 49 cases presently pending before the Commission presenting accounting claims involving IMPL funds. We have examined the accounting reports filed by the Government in these cases with respect to IMPL funds. The aggregate amount deposited in the common IMPL account between 1883 and 1930 to the credit of the tribes involved was less than 20 million dollars.

Although the government's suggestion of liability "amounting to billions" is irresponsible exaggeration, the loss sustained by the tribes that have justiciable claims for breach of the obligation to have made their IMPL funds productive is substantial and its recovery would be very meaningful to them.

They contended that the 1841 Act was one independently sufficient source of the *obligation to have made the funds productive by investment,* and that it specifically prescribes the measure of damages for breach of that obligation. They also contended that the obligation would have existed in the absence of the 1841 Act, independently, under (1) the common law of trusts; (2) the standards of fair and honorable dealings; and (3) after May 25, 1918, the act of that date, all enforceable under the Indian Claims Commission Act. Additionally, they pointed out that it would not have been permissible under the Fifth Amendment (also enforceable under the Indian Claims Commission Act) for the government to have taken the use of their money without subjecting itself to a constitutional obligation to render just compensation.[12]

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[12]*Chippewa Indians v. United States,* 301 U.S. 358, 375-76 (1937):

> . . . Our decisions, while recognizing that the government has power to control and manage the property and affairs of its Indian wards in good faith for their welfare, show that this power is subject to constitutional limitations and does not enable the government to give the lands of one tribe or band to another, or to deal with them as its own. And, of course, an act of Congress should not be given a construction which will imperil its validity where it is reasonably open to a construction free from such peril.

Henkels v. Sutherland, 271 U.S. 298, 301 (1926):

> . . . Whether the government shall pay interest upon its obligations depends upon congressional assent; but it cannot confiscate the actual increment of property belonging to a citizen, or the increment of the proceeds into which such property has been converted, any more than it can confiscate the property or its proceeds, without coming into conflict with the constitution.

[Footnote continued]

As the dissent below points out, no prior case holding the 1841 Act inapplicable involved true trust funds—funds that were indisputably the private property of another at the time the government obtained possession. Here, though it is conceded by all that the funds involved were of such character, the court below concluded, nevertheless, that they were not "funds held in trust by the United States," within the meaning of the 1841 Act because, according to the court, the statute does not mean what it plainly says.

Where the government takes possession and expressly constitutes itself trustee of funds and property belonging to an Indian tribe, it has never been doubted that its conduct is to be judged according to the same standards as apply to any other trustee. *E.g., Seminole Nation v. United States,* 316 U.S. 286, 296-98. A principal obligation of a trustee is to make trust funds productive (*Restatement, (Second), Trusts* §181), and the court below has previously held the government subject to this obligation in its dealings as trustee with Indian funds. *E.g., Menominee Tribe v. United States,* 101 Ct. Cl. 10, 20 (1944).

Apart from the 1841 Act, petitioners contended that the government owed them the obligation to make their trust funds productive under the common law of trusts

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If, tomorrow, Congress were to pass a law providing that tribal moneys which the government has in its possession and is administering as trustee should neither be invested nor credited with interest, no one would seriously contend that the law was constitutional or that its implementation would not subject the United States to an obligation to render just compensation for the taking of the use of private property. Neither the law of trusts nor the Constitution has changed in any relevant particular from the founding of the Nation to the present time.

(enforceable under clause 2 of section 2 of the Indian Claims Commission Act), under the standards of fair and honorable dealings (enforceable under clause 5 of section 2 of such act) and, after its date, under section 28 of the Act of May 25, 1918 (enforceable under clause 1 of section 2 of such act).

Other than to repeat the refrain, that to allow petitioners to recover for failure of the government to have made their trust funds productive would be to award interest on a claim against the United States, the court below made no attempt to explain why the government, admittedly in the position of trustee, was exempt from the obligation of productivity, or why it ought not be held liable under the Indian Claims Commission Act for breach of such obligation.

Finally, notwithstanding that the funds involved were the private property of petitioners in the constitutional sense when the government took possession of them, the court below failed to address the question of how the government could have taken the use of such funds for its own benefit without assuming an obligation to render compensation.

The decision below, that the government can take possession of the private funds of an Indian tribe and use them for its own purposes, without subjecting itself to any obligation either, as trustee, to make them productive for the tribe's benefit, or as sovereign, to compensate for their use, misconstrues section 2 of the 1841 Act (31 U.S.C. §547a) and ignores other relevant statutes (including section 28 of the Act of May 25, 1918, precursor of 25 U.S.C. §162a), the common law of trusts, the standards of fair and honorable dealings, and the Fifth Amendment. If allowed to stand, it will work a

gross injustice and result in substantial loss to the several tribes having justiciable claims for the government's past failures to have made their trust funds productive, and will distort the law respecting the obligations owed by the government when, contemporaneously, it undertakes to act as trustee of Indian funds and property.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Claims.

Respectfully submitted,

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APPENDIX A

CORRECTED COPY
In the United States Court of Claims

(Decided July 11, 1975)

Appeal No. 2–74

Ind. Cl. Comm. Docket No. 22–G

THE UNITED STATES OF AMERICA, APPELLANT v. MESCALERO APACHE TRIBE, ET AL., APPELLEE

Appeal No. 10–74

Ind. Cl. Comm. Docket No. 326–C

THE UNITED STATES OF AMERICA, APPELLANT v. THE SHOSHONE-BANNOCK TRIBES OF THE FORT HALL RESERVATION, IDAHO, APPELLEE

Appeal No. 12–74

Ind. Cl. Comm. Docket No. 326–A

THE UNITED STATES OF AMERICA, APPELLANT v. TE-MOAK BANDS OF WESTERN SHOSHONE INDIANS OF NEVADA, ET AL., APPELLEE-CROSS-APPELLANT

A. Donald Mileur, with whom was *Assistant Attorney General Wallace H. Johnson*, for appellant. *Richard L. Beal*, attorney for appellant in No. 2–74. *Craig A. Decker*, attorney for appellant in Nos. 10–74 and 12–74.

I. S. Weissbrodt, attorney of record for Appellee, Mescalero Apache Tribe. *Weissbrodt & Weissbrodt*, *Richmond F. Allen* and *Howard L. Sribnick*, of counsel.

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Pierre J. LaForce for Appellees The Shoshone-Bannock Tribes and Te-Moak Bands of Western Shoshone Indians. *Frances L. Horn*, attorney of record. *Wilkinson, Cragun & Barker* and *Robin A. Friedman*, of counsel.

Before COWEN, *Chief Judge*, DURFEE, *Senior Judge*, DAVIS, SKELTON, NICHOLS, KUNZIG, and BENNETT, *Judges*.

ON APPEAL FROM THE INDIAN CLAIMS COMMISSION

SKELTON, *Judge*, delivered the opinion of the court:

This is an appeal by the Government from orders of the Indian Claims Commission (Commission) in three Indian accounting cases (consolidated for this appeal) in which the Commission awarded simple and compound interest from 1883 to 1930 against the Government on trust funds it held for the three appellee Indian Tribes, notwithstanding the provisions of 28 U.S.C. § 2516(a) (1970) and the well established rule set forth in many decisions of the Supreme Court and of this court and other courts that in noneminent domain cases interest on a claim against the United States can be allowed *only* under a contract, treaty, or an Act of Congress *expressly* providing for the payment of interest. The orders of the Commission awarding interest cannot stand, and we reverse.

One of the Indian Tribes, the Te-Moak Bands of Western Shoshone Indians of Nevada (Te-Moaks), filed a cross-appeal from an order of the Commission denying it interest on shortages in the payments due it by the Government under the Western Shoshone Treaty of October 1, 1863, 18 Stat. 689. The Commission held that these shortages were never paid and were never set up as trust funds and could not bear interest as they never in fact existed. We think the order of the Commission in this regard was correct and we affirm. A discussion of the law and the facts follows.

The Government appealed from the following orders of the Commission:

(1) The order of October 4, 1973, 31 Ind. Cl. Comm. 427, 557, and 559, Te-Moak Bands of Western Shoshone Indians

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of Nevada, Docket No. 326-A (Appeal No. 12-74) and Mescalero Apache Tribe (Mescalero Apaches), Docket No. 22-G (Appeal No. 2-74) holding that the United States is liable for simple interest and compound interest on the fund known as "Indian Moneys, Proceeds of Labor" (I.M.P.L. Funds),[1] from 1883 to 1930.

(2) The order of January 16, 1974 (unreported), holding that the above order of October 4, 1973, was the law of the case in Shoshone-Bannock Tribes of the Fort Hall Reservation (Shoshone-Bannocks), Docket No. 326-C (Appeal No. 10-74).

The Te-Moaks cross-appealed as to that part of the above order of October 4, 1973, that denied them interest on the unpaid shortages of treaty funds mentioned above. They also cross-appealed from the Commission's order of April 4, 1974, 33 Ind. Cl. Comm. 417, 435 denying their motion for rehearing on the decision of October 4, 1973, above.

By way of background, it should be pointed out that prior to 1883 the I.M.P.L. Funds were not extensive and were held by local Government agents. These agents disbursed these funds from time to time to meet the needs of the Indians. Such expenditures were usually made after consultation with the Indians and with their approval. However, by 1883 the I.M.P.L. Funds had begun to increase in amount and it was decided that they should be taken from the local agents and deposited in the U.S. Treasury for the benefit of the Indians. The Act of March 3, 1883, ch. 141, 22 Stat. 590 was the result. It reads in pertinent part as follows:

> The proceeds of all pasturage and sales of timber, coal, or other product of any Indian reservation, except those of the five civilized tribes, and not the result of the labor of any member of such tribe, shall be covered into the Treasury for the benefit of such tribe under such regulations as the Secretary of the Interior shall prescribe; and the Secretary shall report his action in detail to Congress at its next session.

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[1] This fund was composed of miscellaneous receipts from Indian reservations derived from such sources as sales of grazing leases, oil and gas leases, timber, coal and other natural resources. They were deposited in the Treasury pursuant to the Act of March 3, 1883, 22 Stat. 590, as amended, 25 U.S.C. § 155 (1970).

Significantly, the Act makes no mention of a duty to invest such proceeds or to pay interest thereon. To the contrary, it expressly provides that the proceeds "shall be covered [deposited] into the Treasury for the benefit of such tribe under such regulations as the Secretary of Interior shall prescribe."

Pursuant to the 1883 Act, the I.M.P.L. Funds were deposited in the Treasury for the first time in one common fund for all of the Indians. But due to a technicality in the Act, the Secretary of the Treasury would not allow the Secretary of the Interior to withdraw any of these funds without an appropriation by Congress. This proved to be a cumbersome arrangement because the money was needed from time to time to meet the needs of the Indians. As a consequence, the Act was amended by the Act of March 2, 1887, ch. 320, 24 Stat. 463 which provided in pertinent part as follows:

> That the Secretary of the Interior is hereby authorized to use the money which has been or may hereafter be covered into the Treasury under the provisions of the act approved March third, eighteen hundred and eighty-three, and which is carried on the books of that Department under the caption of "Indian moneys, proceeds of labor," for the benefit of the several tribes on whose account said money was covered in, in such way and for such purposes as in his discretion he may think best, and shall make annually a detailed report thereof to Congress.

This 1887 amendment gave the Secretary of the Interior the authority to use the I.M.P.L. Funds in his discretion for the benefit of the Indians without an appropriation by Congress. It is significant that the 1887 amendment, like the Act of 1883, did not provide for the payment of interest on I.M.P.L. Funds. Actually, these funds were transient in character because they were paid out from time to time to provide for the needs of the Indians. Obviously, funds of this character did not lend themselves to investment purposes to earn interest because they were not available for a sufficient length of time to allow them to be used to purchase stocks or bonds or other securities that would earn interest only after a long period of time. It is clear that Congress did not intend to pay interest on these funds nor to require them to be invested in interest bearing stocks, bonds, or other

securities. The existing facts mentioned above militate against any such intention, and clearly the Acts of 1883 and 1887 did not require the Government to pay interest on these funds nor that they be made productive otherwise.

The statute controlling I.M.P.L. Funds was amended again by the Act of May 17, 1926, ch. 309, 44 Stat. 560 and provided in pertinent part as follows:

> * * * That hereafter all miscellaneous revenues derived from Indian reservations, agencies, and schools, which are not required by existing law to be otherwise disposed of, shall be covered into the Treasury of the United States under the caption "Indian moneys, proceeds of labor," and are hereby made available for expenditure, in the discretion of the Secretary of the Interior, for the benefit of the Indian tribes, agencies, and schools on whose behalf they are collected, subject, however, to the limitations as to tribal funds, imposed by section 27 of the act of May 18, 1916 (Thirty-ninth Statutes at Large, page 159).

This amendment, like the Acts of 1883 and 1887 did not provide for the payment of interest on I.M.P.L. Funds. By this time it was clear that Congress knew that no interest was being paid on these funds and that they were not otherwise productive, and that Congress approved of this manner of handling I.M.P.L. Funds. This knowledge of Congress and its approval of the administrative interpretation of the I.M.P.L. statutes as not to require payment of interest by the Government on I.M.P.L. Funds or make them otherwise productive is forcefully shown in the records of this case by the reports to Congress by the Commissioner of Indian Affairs for 1904 and 1905 which stated that Indian funds were divided into two categories, namely, (1) "Trust Funds and Trust Lands" and (2) "Income of Indian Tribes." Under the trust funds classification were listed all the funds *required to be productive* as a trust fund held by the Government by an act, resolution or treaty. Such funds bore interest and the principal amounts and the interest earned were shown together with the appropriate congressional authority for each tribe for each year. The second classification "Incomes of Indian Tribes" consisted of four sub-classifications, namely, (1) "Interest on trust fund," (2) "Treaty and agreement obli-

gations," (3) "Gratuities," and (4) "Indian moneys, proceeds of labor and miscellaneous (I.M.P.L. Funds)." It was obviously clear to Congress that no interest was being paid on I.M.P.L. Funds and that Congress approved of this manner of handling these funds.

This brings us to 1929 when the Secretary of the Interior recommended to Congress that the noninterest bearing I.M.P.L. Funds held by the Government for Indians be made interest bearing funds. It is significant that he stated in his recommendation:

> It is conceded that there is no legal obligation to pay interest on these funds * * *.

The Congress responded by enacting the Act of February 12, 1929, ch. 178, 45 Stat. 1164, which provided in pertinent part:

> * * * That all money in excess of $500 held by the United States in a trust fund account, and carried on the books of the Treasury Department to the credit of an Indian tribe, if the payment of interest thereon is not otherwise authorized by law, shall bear simple interest at the rate of 4 per centum per annum from the date of the passage of this Act. * * *

Although it appears that the Secretary of Interior had intended that I.M.P.L. Funds would be included in the 1929 legislation, the Comptroller General ruled on May 31, 1929, that it did not because the I.M.P.L. Fund was not "carried on the books of the Treasury Department to the credit of an Indian Tribe." Decision A-27308, 8 Comp. Gen. 625.

Because of this technicality, the Secretary of the Interior requested additional legislation that would make I.M.P.L. Funds interest bearing. The Congress responded by enacting the Act of June 13, 1930, ch. 483, § 2, 46 Stat. 584, that provided in pertinent part as follows:

> Sec. 2. All tribal funds arising under the Act of March 3, 1883 (22 Stat. 590), as amended by the Act of May 17, 1926 (44 Stat. 560), now included in the fund 'Indian Money, Proceeds of Labor,' shall, on and after July 1, 1930, be carried on the books of the Treasury Department in separate accounts for the respective tribes, and all such funds with account balances exceeding $500 shall bear simple interest at the rate of 4 per centum per annum from July 1, 1930.

The record from 1883 to 1929–30 is unequivocal. The Executive Branch understood that it possessed no authority to pay interest on I.M.P.L. Funds. Congress not only concurred in this construction, but, in each of its Acts directly involving I.M.P.L. legislation (Acts of 1883, 1887, and 1926), conspicuously omitted any provision for the payment of interest. Under the well established rule against interest, each of these omissions was an unequivocal declaration by Congress that no interest thereon was intended.

With this background, the record shows in these accounting cases that in the *Te-Moak* case, Docket No. 326–A, the Government filed its accounting report showing that $314,241.19 was deposited in its I.M.P.L. account between 1899 and 1951, and that no interest was paid on the fund until June 30, 1930, after which date interest was paid pursuant to the Act of June 13, 1930, at the rate of four percent per annum.

In Shoshone-Bannock, Docket No. 326–C the accounting report of the Government showed that $380,628.76 was deposited in its I.M.P.L. account between 1887 and 1951, and that no interest was paid on the account prior to June 30, 1930, after which date interest was paid pursuant to the Act of June 13, 1930, at the rate of four percent per annum.

In Mescalero Apache, Docket No. 22–G, the accounting report of the Government showed that $1,670,620.38 was deposited in the I.M.P.L. account between 1887 and 1950, and that no interest was paid on this account until June 30, 1930, after which interest was paid pursuant to the Act of June 13, 1930, at the rate of four percent per annum.

In these accounting cases, which were filed under the Indian Claims Commission Act of August 13, 1946 (25 U.S.C. § 70a (1970), 60 Stat. 1050), the Indians claimed simple and compound interest on the above I.M.P.L. Funds from 1883 when they were first deposited in the Treasury to 1930 when the Congress directed for the first time in the Act of 1930 that interest be paid thenceforth at the rate of four percent per annum. The Commission allowed the claim and awarded the Indians simple and compound interest against the United States for the period stated. The legality of this award is before us for determination.

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It is obvious that the award is in direct conflict with 28 U.S.C. § 2516(a) (1970), which provides as follows:

> § 2516. Interest on claims and judgments.
> (a) Interest on a claim against the United States shall be allowed in a judgment of the Court of Claims *only* under a contract or Act of Congress *expressly providing for payment thereof.* [Emphasis supplied.]

The awards of interest is also in conflict with many decisions of the Supreme Court and of this court that interest may not be allowed on a claim against the United States in noncondemnation cases unless there is a contract or a statute expressly providing for the payment of interest. These cases will be discussed below.

It is fundamental that the Government has sovereign immunity from suit except where Congress has by legislation expressly waived such immunity. This principle applies to claims for interest against the United States. *See Ute Indians* v. *United States*, 45 Ct. Cl. 440, 470 (1910); *United States* v. *North Carolina*, 136 U.S. 211 (1890); *United States* v. *Sherman*, 98 U.S. 565 (1878); *United States ex rel. Angarica* v. *Bayard*, 127 U.S. 251, 260 (1888); *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654, 658–59 (1947); and *Smyth* v. *United States*, 302 U.S. 329 (1937).

The rule of sovereign immunity from suit against the Government without its consent is firmly established in our judicial system. The following cases are of interest in this regard:

In *Nassau Smelting & Refining Works* v. *United States*, 266 U.S. 101 (1924), the Supreme Court held:

> * * * The objection to a suit against the United States is fundamental, whether it be in the form of an original action or a set-off or a counterclaim. Jurisdiction in either case does not exist unless there is *specific congressional authority* for it. * * * [*Id.* at 106.] [Emphasis supplied.]

Again, in *United States* v. *Sherwood*, 312 U.S. 584 (1941), the Supreme Court said:

> The United States, as sovereign, is immune from suit save as it consents to be sued, *United States* v. *Thompson*, 98 U.S. 486; *United States* v. *Lee*, 106 U.S. 196; *Kansas* v. *United States*, 204 U.S. 331; *Minnesota* v. *United States*, 305 U.S. 382, 387; *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381, 388; *United States* v. *Shaw*, 309 U.S. 495 (see cases cited in *The Pesaro*, 277 F. 473, 474, *et seq.*), and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit. *Minnesota* v. *United States*, *supra*, 388 and cases cited; cf. *Stanley* v. *Schwalby*, 162 U.S. 255, 270. * * * [*Id.* at 586–87.]

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Many cases have held that the waiver of sovereign immunity cannot be implied but must be unequivocally expressed. In *General Mut. Ins. Co.* v. *United States*, 119 F. Supp. 352 (N.D.N.Y. 1953), the court said:

> It is beyond argument that the United States may be sued only where its immunity has been specifically waived by statute, and that *such waiver may not be implied in the construction of an ambiguous statute.* [Emphasis supplied.] [*Id.* at 354.]

In *Leyerly v. United States*, 162 F. 2d 79 (10th Cir. 1947), the court held:

> *The government does not consent to be sued by implication*, and consent to be sued should not be extended beyond the plain terms of the authorizing statute. *Price* v. *United States and Osage Indians*, 174 U.S. 373, 19 S. Ct. 765, 43 L. Ed. 1011; *Eastern Transportation Co.* v. *United States*, 272 U.S. 675, 47 S. Ct. 289, 71 L. Ed. 472; * * *. [Emphasis supplied.] [*Id.* at 84.]

In the case of *North Dakota-Montana Wheat Growers' Ass'n* v. *United States*, 66 F. 2d 573 (8th Cir. 1933), *cert. denied*, 291 U.S. 672 (1934) the court said:

> It is fundamental that the United States cannot be sued without its permission, and that permission must be specifically granted by Congress. *It will not be implied.* It is a deep-rooted principle in the fabric of all English speaking countries that a sovereign is immune from suits in its own courts. In *Nassau Smelting & Refining Works, Ltd.* v. *United States*, 266 U.S. 101, 106, 45 S. Ct. 25, 69 L. Ed. 190, the court said: "The objection to a suit against the United States is fundamental, whether it be in the form of an original action, or a set-off, or a counterclaim. Jurisdiction in either case does not exist, unless there is specific congressional authority for it. * * *" [Emphasis supplied.] [*Id.* at 577.]

In *United States* v. *King*, 395 U.S. 1 (1969), the Supreme Court said:

> * * * [J]urisdiction to grant relief depends wholly upon the extent to which the United States has waived its sovereign immunity to suit and that *such a waiver cannot be implied but must be unequivocally expressed. United States* v. *Sherwood*, 312 U.S. 584. [Emphasis supplied.] [*Id.* at 4.]

These decisions are especially applicable to the case before us, because here there was no contract nor statute expressly providing for the payment of interest on the I.M.P.L. Funds of the Indians. Furthermore, there was no Act of Congress that specifically and unequivocally waived the sovereign immunity of the Government to suit for interest on I.M.P.L. Funds by the Indians. It follows, therefore, that the Commission was without jurisdiction or authority to award the Indians interest against the United States in this case.

The allowance of interest by the Commission is directly contrary to the many court decisions that hold that interest cannot be awarded against the Government in the absence of a contract or a statute expressly providing for interest. We will now consider some of those cases.

In the early case of *United States ex rel. Angarica* v. *Bayard*, *supra*, the Supreme Court announced the correct rule as to the allowance of interest against the United States, which is the law at the present time as follows:

> The case, therefore, falls within the well-settled principle, that the United States are not liable to pay interest on claims against them, in the absence of express statutory provision to that effect. It has been established, as a general rule, in the practice of the government, that interest is not allowed on claims against it, whether such claims originate in contract or in tort, and whether they arise in the ordinary business of administration or under private acts of relief, passed by Congress on special application. The only recognized exceptions are, where the government stipulates to pay interest and where interest is given expressly by an act of Congress, either by the name of interest or by that of damages.
>
> This appears from a succession of the opinions of the Attorneys General of the United States, given by Attorneys General Wirt, Crittenden, Legare, Nelson, Johnson, Cushing and Black, and appearing in the following volumes and pages of those opinions, as published: 1, 268; 1, 550; 1, 554; 3, 635; 4, 14; 4, 136; 4, 286; 5, 105; 7, 523; 9, 57; and 9, 449.
>
> Not only is this the general principle and settled rule of the executive department of the government, but it has been the rule of the legislative department, because Congress, though well knowing the rule observed at the Treasury, and frequently invited to change it, has refused to pass any general law for the allowance and payment of interest on claims against the government. Such statutes for the payment of interest as have been passed, apply to specific cases enumerated in the several statutes, and do not cover the present case.
>
> The principle above stated is recognized by this court. In *Tillson* v. *United States*, 100 U.S. 43, 47, this court, speaking of the rule that interest is recoverable between citizens if a payment of money is unreasonably delayed, says that with the government the rule is different, and that the practice has long prevailed in the departments of not allowing interest on claims presented, except it is in some way specially provided for. See also *Gordon* v. *United States*, 7 Wall. 188, and *Harvey* v. *United States*, 113 U.S. 243, 248, 249. [*Id.* at 260.]

The rule against allowing interest was stated again by the Supreme Court in *United States.* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585 (1947) as follows:

> The pertinent part of § 177(a) of the Judicial Code provides that "No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, * * *" Section 177(a) thus embodies the traditional rule that interest cannot be recovered against the United States upon unpaid accounts or claims in the absence of an express provision to the contrary in a relevant statute or contract. *Tillson v. United States*, 100 U.S. 43, 47; *United States* v. *North American Co.*, 253 U.S. 330, 336; *United States* v. *Goltra*, 312 U.S. 203, 207. * * *
>
> * * * The sole issue thus becomes whether there is any express provision in the Act or in the lease permitting the recovery of interest under the circumstances. Only if there is such a provision can respondent avoid the traditional rule set forth in § 177(a).
>
> *   *   *   *   *
>
> But in order to override the historical rule codified in § 177(a), something more is necessary than an equivo-

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cal use of the term "just compensation." It is not enough that the term might be construed to include the payment of interest. As § 177(a) itself indicates, there must be a provision in the contract "expressly stipulating for the payment of interest." That provision must be affirmative, clear-cut, unambiguous; and an unexpressed intention by the parties that the term "just compensation" be construed to include interest is insufficient. *Likewise, where a statute is relied upon to overcome the force of § 177(a), the intention of Congress to permit the recovery of interest must be expressly and specifically set forth in the statute. Tillson* v. *United States, supra*, 46; *United States ex rel. Angarica* v. *Bayard*, 127 U.S. 251, 260. Mere use of the term "just compensation," without more, is no substitute for an express provision for interest.

Here neither the Act of March 30, 1920, nor the lease under which respondent operated contains an express provision for the payment of interest, either in addition to or as a part of the "just compensation" to be paid to respondent. If the United States had desired to provide by statute or to contract in the lease for the payment of interest, it would have been easy to have said so in express terms. Because it did not say so, we are led irresistibly to the conclusion that it did not intend to negative the effect of § 177(a) in this instance. *Tillson* v. *United States, supra.* [Footnote omitted.] [Emphasis supplied.] [*Id.* at 588–590.]

Again in *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654 (1947), the Supreme Court held:

In our opinion, § 177(a) of the Judicial Code prohibits the award of any interest under the circumstances of this case. Section 177(a) provides that "No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest. * * *" As we recently pointed out in *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585, this provision codifies the traditional rule regarding the immunity of the United States from liability for interest on unpaid accounts or claims. In other words, in the absence of constitutional requirements, interest can be recovered against the United States only if express consent to such a recovery has been given by Congress. And Congress has indicated in § 177(a) that its consent can take only two forms: (1) *a specific provision for the payment of interest in a statute;* (2) an express stipulation for the payment of interest in a contract duly entered into by agents of the United States. Thus *there can be no consent by implication or by use of ambiguous language.* Nor can an intent on the part of the framers of a statute or contract to permit the recovery of interest suffice where the intent is not translated into affirmative statutory or contractual terms. *The consent necessary to waive the traditional immunity must be express, and it must be strictly construed. Tillson* v. *United States*, 100 U.S. 43; *United States* v. *Thayer-West Point Hotel Co., supra.*

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Tested by those standards, the award of interest in this case cannot be sustained. There is obviously no contractual stipulation involved. And the appropriation statutes which cover the refunds here in issue contain no provision whatever for the recovery of interest. Act of May 14, 1937, 50 Stat. 137, 142; Act of June 25, 1938, 52 Stat. 1114, 1149. The traditional immunity of the United States, as codified in § 177(a), accordingly applies.

The Court of Claims, without making a reference to § 177(a), sought to justify its award of interest on what it thought "would be right or just." * * *

*　　*　　*　　*　　*

But assuming that the equities of the situation all favor the owners of the refund claims, the Court of Claims did not thereby acquire power to carve out an implied exception to the plain words of § 177(a). Had Congress desired to permit the recovery of interest in situations where the Court of Claims felt it just or equitable, it could have so provided. The absence of such a provision is conclusive evidence that the court lacks any power of that nature. Indeed, any other conclusion would permit the Court of Claims to supply the consent which only Congress can give to the imposition of interest against the United States.

* * * Only Congress can take the necessary steps to waive the immunity of the United States from liability for interest on unpaid claims. Cf. *Smyth* v. *United States*, 302 U.S. 329, 353.

* * * It is enough to note that the traditional rule embodied in § 177(a) is a complete one covering all types of claims, including those arising out of pre-existing judgments. As we have seen, any exception to that rule must be grounded upon *an express provision in a statute or contract.* It follows that any exception relating to pre-existing judgments must be traced to *specific lan-*

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> *gage in a contract or some other statute.* Section 177(a) by itself warrants no such exception. * * *
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> * * * * *
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> * * * Courts lack the power to award interest against the United States on the basis of what they think is or is not sound policy. We reiterate that *only express language in a statute or contract can justify the imposition of such interest.* Such language is absent in this instance.
>
> We accordingly reverse the judgment of the Court of Claims in No. 94 to the extent that it includes an award of interest. * * * [Emphasis supplied.] [*Id.* bridging pages 658–63.]

In the case of *Albrecht* v. *United States*, 329 U.S. 599 (1947), the Supreme Court said:

> Turning now to the right to interest under the contracts, and apart from the contention regarding the Fifth Amendment, we find that the contracts have no provision for payment of interest. No statute authorizes the payment of interest in cases like this. *In the absence of specific contract or statutory provisions no interest runs against the Government* even though the Government's payment for the contract purchases be delayed. See *Smyth* v. *United States*, 302 U.S. 329, 353; *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585, 588; *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654, 659–660. [Emphasis supplied.] [*Id.* at 605.]

The Supreme Court held in *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48 (1951):

> * * * We granted certiorari limited to the question presented by the award of interest. 340 U.S. 873 (1950).
>
> It is the "traditional rule" that *interest* on claims against the United States *cannot be recovered in the absence of an express provision to the contrary in the relevant statute or contract.* 28 U.S.C. (Supp. III) § 2516(a). *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585, 588 (1947), and cases cited therein. * * * [Emphasis supplied.] [*Id.* at 49.]

In the case of *Ramsey* v. *United States*, 121 Ct. Cl. 426, 101 F. Supp. 353 (1951), *cert. denied*, 343 U.S. 977 (1952), we held:

> However, the common law rule that delay or default in payment of money gives rise to a right to recover interest has been held not to be applicable to the sovereign government on grounds of public convenience, unless the sovereign's consent to pay interest has been exhibited by an act of the Congress, or by a lawful contract of its executive officers. *United States* v. *North American Transportation & Trading Co.*, 253 U.S. 330; *United States* v. *North Carolina*, 136 U.S. 211, 216; *United States ex rel. Angarica* v. *Bayard*, 127 U.S. 251; *Richmond, Fredericksburg & Potomac Railroad Co.* v. *United States*, 95 C. Cls. 244; *Hinds* v. *United States*, 70 C. Cls. 288, 293. Congress has specifically provided by an Act of June 25, 1948, ch. 646, sec. 1, 62 Stat. 978, U.S. Code Title 28 (Supp. IV), § 2516(a), that:
>
> > Interest on a claim against the United States shall be allowed in a judgment of the Court of Claims only under a contract or Act of Congress expressly providing for payment thereof.
>
> A provision in a Government contract for the payment of interest must be affirmative, clear-cut, and unambiguous. *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585. The Supreme Court has held that although an award of interest on a claim against the United States would be just or equitable, this fact alone does not empower the Court of Claims to make such an award on the basis of what they think is a sound policy. The immunity of the United States from liability for interest on unpaid claims is not to be waived by such policy arguments. *United States* v. *New York Rayon Importing Co.*, 329 U.S. 654. * * * [*Id.* at 431–32, 101 F. Supp at 356.]

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We held in *Confederated Salish & Kootenai Tribes* v. *United States*, 175 Ct. Cl. 451 (1966), *cert. denied*, 385 U.S. 921:

> For many decades *Congress has forbidden interest* on a plaintiff's claim in this court *unless a contract or a statute has "expressly" provided for interest.* 28 U.S.C. § 2516(a). *This rule has won strict adherence in many kinds of cases, including Indian claims. Tillson* v. *United States*, 100 U.S. 43 (1879); *United States* v. *North American Transp. Co.*, 253 U.S. 330, 336 (1920); *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585 (1947); *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654 (1947); *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48 (1951); *Loyal Band of Creek Indians* v. *United States*, 118 Ct. Cl. 373, 382–83, 97 F. Supp. 426, 431 (1951), *cert. denied*, 342 U.S. 813. * * * [Emphasis supplied.] [*Id.* at 454.]

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The Indians and the Commission rely heavily on the decisions in *United States* v. *Blackfeather*, 155 U.S. 180 (1894) and *Peoria Tribe* v. *United States*, 390 U.S. 468 (1968) as authority for the allowance of interest here. Their reliance on those cases is misplaced, because they are clearly distinguishable and are not apposite. The Supreme Court held in those cases that treaties existed with the Indians that ***required*** the payment of interest. Of course, under those circumstances, it was proper for interest to be allowed and paid, as a treaty requirement for interest is one of the exceptions to the no-interest rule. But we have no such treaty here, and, accordingly, *Blackfeather* and *Peoria* are of no help to the Indians or the Commission.

The Commission attempts to avoid the no-interest rule by calling interest "damages." Here again the cases are squarely against this theory of the Commission. In *Moran Brothers Co.* v. *United States*, 61 Ct. Cl. 73 (1925), we held:

> * * * Calling interest "damages" or loss does not deprive it of being interest, and the statute forbids the allowance of interest. It is frequently the case that interest, where not stipulated for, is allowed by the courts as damages for the detention of money or as compensation to which a plaintiff is entitled, but this rule is not applicable to the sovereign, "and, as has been settled on grounds of public convenience, it is not to be awarded against a sovereign government, unless its consent to pay interest has been manifested by an act of its legislature or by a lawful contract of its executive officers." *United States* v. *North Carolina*, 136 U.S. 211, 216. See also *Sherman case*, 98 U.S. 565; *Angarica* v. *Bayard*, 127 U.S. 251, 260. [*Id.* at 106.]

In *Ramsey* v. *United States*, *supra*, we held:

> * * * The payment of interest as such was neither expressly provided for by the corporation's contract with the War Department, nor by any Act of Congress. Plaintiffs attempt to avoid the effect of this *by designating their claim as one for damages*, consisting of interest on amounts paid out by the corporation to third persons. But, as this court pointed out in *Moran Brothers Co.* v. *United States*, 61 C. Cls. 73, 106, "*Calling interest 'damages' or loss does not deprive it of being interest, and the statute forbids the allowance of interest.*" [Emphasis supplied.] [*Id.* at 432, 101 F. Supp. at 356.]

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The Supreme Court said in *Cherokee Nation* v. *United States*, 270 U.S. 476 (1926):

> * * * The additional interest now claimed is sought really *as damages* for the delay of Congress in appropriating the sum due in 1895 as the United States promised in the 1891 agreement. *But the rule as to interest against the United States does not allow us to adjudge interest as damages at all.* Congress must expressly provide for it or the contract must so provide. * * * [Emphasis supplied.] [*Id.* at 490.]

On occasion, courts have felt that certain special circumstances warranted an exception to the interest rule. In *Goltra* v. *United States*, 91 Ct. Cl. 42 (1940), because the jurisdictional act permitted judgments "for just compensation" the court concluded that:

> Judgment is entered for the plaintiffs in the sum of $350,000, with interest at six percent per annum, not as interest but as a part of just compensation, * * *. [*Id.* at 75.]

On appeal, the Supreme Court reversed, *United States* v. *Goltra*, 312 U.S. 203 (1941), holding that the traditional rule against allowing interest must be applied. [*Id.* at 207, 211.]

In *Thayer-West Point Hotel Co.* v. *United States*, 106 Ct. Cl. 60 (1946), this court concluded that:

> Both statute and contract expressly provide for the payment of "just compensation." * * * [*Id.* at 81.]

The court allowed four percent interest on the principal sum. On appeal, *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585 (1947), the Supreme Court reversed our allowance of interest and after noting that the "just compensation" provisions "may or may not imply an obligation to pay interest" went on to state:

> But in order to override the historial rule [no interest against the United States] * * * something more is necessary than an equivocal use of the term "just compensation." It is not enough that the term might be construed to include the payment of interest. * * * [T]here must be a provision in the contract "expressly stipulating for the payment of interest." That provision must be affirmative, clear-cut, unambiguous; * * *. [*Id.* at 590.]

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See also United States ex rel. Angarica v. *Bayard*, 127 U.S. 251, 259–60 (1888), wherein the United States had assumed a duty to invest certain trust moneys. Plaintiffs maintained that they were entitled to *incremental or income damages* on the principal amount. However, the Supreme Court pointed out "*but the claim in that respect is not different in character from what it would have been if * * * it were a claim for interest * * **" [Emphasis supplied] and went on to hold that incremental *damages* based on the investment duty were barred by the general no-interest rule. *Angarica* is cited with approval in *United States* v. *Thayer-West Point*, *supra* at 590, and also in *Ramsey* v. *United States*, *supra* at 432.

Recent Indian cases, applying the principles of *Goltra*, *Thayer-West Point Hotel*, *Angarica*, and *Ramsey* above, indicate that the same no-interest rule applies to *any* incremental *damages* sought to be assessed against the United States, whether it be designated interest, as such, or is designated by some other terminology which has the same effect. *See Pawnee Indian Tribe of Oklahoma* v. *United States*, 157 Ct. Cl. 134, 137, 140, 301 F. 2d 667, 668–70, *cert. denied*, 370 U.S. 918 (1962), where the Commission was reversed for permitting only the present worth of the defendant's consideration payments because this would be tantamount to charging the United States interest. *See also United States* v. *Delaware Tribe*, 192 Ct. Cl. 385, 427 F. 2d 1218 (1970), where the Commission had applied an annual reduction to the Government's offset claims, but this court reversed noting that:

> * * * We conclude that even if it could be said that the $72,600.37 was not interest per se or interest in the strict sense of the word, the act of the Commission in denying this amount as offsets solely by reason of its five percent rule had the effect of granting interest on the award. We do not believe the Commission can do indirectly what it is prohibited from doing directly. [*Id.* at 394, 427 F. 2d at 1223.]

Also see United States v. *Nez Perce Tribe of Indians*, 194 Ct. Cl. 490, 494–499, *cert. denied*, 404 U.S. 872 (1971), where the court, in reversing the Commission, pointed out

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that *Peoria Tribe* v. *United States*, *supra*, did not change the usual rule that absent a breach of a specific treaty obligation, no interest, or its equivalent, can be allowed against the United States.

It may be seen from the foregoing decisions that the character or nature of "interest" cannot be changed by calling it "damages," "loss," "earned increment," "just compensation," "discount," "offset," or "penalty," or any other term, because it is still interest and the no-interest rule applies to it.[1]

The Commission is not consistent in its reasoning. It devoted much of its 123 page decision to a discussion of why the Indians were entitled to an award of interest against the United States, including the following statement, among others:

> * * * We are not here awarding *interest* on a judgment for *simple interest*, but including an additional factor in our judgment to make up for the income which should have been, but was not, earned on reinvested *interest*.
>
> The only practical way we can think of to assess *damages* for failure to comply with the law requiring investment and reinvestment of the income *is by awarding compound interest*. [Emphasis supplied.] [31 Ind. Cl. Comm. 427, 529.]

This statement obviously means the Commission awarded both simple and compound interest against the Government. The clear meaning of the decision considered as a whole shows this to be true. In this regard, it is significant that Commissioner Vance was not the slightest bit evasive and minced no words as to his understanding of the award the Commission was making when he stated in his concurring opinion:

> Equity and good conscience, dominant principles in these accounting cases, as well as the plain language of the 1841 act, *compel us to award compound interest*. [Emphasis supplied.] [31 Ind. Cl. Comm. 427, 550.]

Yet the Commission says on the other hand it is not award-

[1] Former Chief Judge Jones observed in *Union Pacific RR Co.* v. *United States*, 117 Ct. Cl. 534, 91 F. Supp. 762 (1950) that calling a billy goat a horse did not make him one.

ing interest but damages. See 31 Ind. Cl. Comm. 427, 527 where the Commission said:

> In awarding *damages* equal to compound interest * * * for the period between 1883 * * * and ending June 30, 1930, * * *.
>
> * * * [W]e have the authority, and duty, to award *damages* for breach of the 1841 act, *which damages are measured by interest.* * * * [Emphasis supplied.]

Although the Commission speaks of awarding damages, it is clear that it awarded interest, and that this was done principally on the basis of an Act of Congress of 1841, which will be discussed below. Yet we find the astonishing statement of the Commission in its order overruling the motion for rehearing of the Te-Moaks, 33 Ind. Cl. Comm. 417, 424:

> *The 1841 act does not authorize us to award interest against the Government.* * * * [Emphasis supplied.]

Commissioner Vance signed this order as one of the three who made up the majority of the Commission. This statement is diametrically opposed to the statement in his concurring opinion quoted above.

This switching back and forth from an award of interest to damages and back to interest by the Commission would lead one to believe the Commission was well aware that under the law and the facts of this case it had neither jurisdiction nor authority to allow interest on the claim of the Indians against the United States, but concluded that it would be right or just for the Indians to receive the interest. This court was reversed by the Supreme Court for awarding interest against the Government on exactly the same basis in *United States* v. *N. Y. Rayon Importing Co.*, 329 U.S. 654 (1947). There the Supreme Court said:

> The Court of Claims, * * * sought to justify its award of interest on what it thought "*would be right or just.*" * * *
>
> But assuming that the *equities* of the situation all favor the owners of the refund claims, the Court of Claims did not thereby acquire power to carve out an implied exception to the plain words of § 177(a). Had Congress desired to permit the recovery of interest in situations where the Court of Claims felt it *just or equitable*, it could have so provided. The absence of such a provision is conclusive evidence that the court

> lacks any power of that nature. Indeed, *any other conclusion would permit the Court of Claims to supply the consent which only Congress can give to the imposition of interest against the United States.* [Emphasis supplied.] [*Id.* at 659–60.]

Obviously, the same reasoning applies to the lack of power of the Commission to award interest, unless the requirements of the no-interest rule are met. *See also United States* v. *Omaha Tribe of Indians*, 253 U.S. 275, 283 (1920), in which the Supreme Court held that the rule of *equity* would not take the case out of the usual no-interest rule even though the jurisdictional act called for a consideration of both *equitable* and legal claims. No matter how high the purpose or how benevolent the motive, neither this court nor the Commission can award interest against the Government unless the requirements of the no-interest rule have been met. *See also Loyal Band of Creek Indians* v. *United States*, 118 Ct. Cl. 373, 382–83, 97 F. Supp. 426, 431, *cert. denied*, 342 U.S. 813 (1951).

In any event, we hold that the order of the Commission was an award of simple and compound interest on the claim of the Indians against the United States. This award was contrary to law, as shown by the foregoing authorities, unless there was a contract, treaty, or agreement between the Indians and the United States or an Act of Congress expressly providing for the payment of interest. Neither the Indians nor the Commission contend that a contract, treaty or agreement existed that provided for the payment of interest. Therefore, the sole question is whether there was any statute or other Act of Congress that expressly required the interest payment.

The Indians and the Commission contend that there were two statutes that required or at least authorized the award of interest in this case. These statutes were: (1) The Act of September 11, 1841, ch. 25, 5 Stat. 465, and (2) the Indian Claims Commission Act of August 13, 1946, 25 U.S.C. § 70a (1970). We will first consider the 1841 Act upon which the Indians and the Commission principally rely, which reads as follows:

> Chap. XXV.—*An Act to repeal a part of the sixth section of the act, entitled "An act to provide for the*

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> *support of the Military Academy of the United States for the year eighteen hundred and thirty-eight, and for other purposes," passed July seventh, eighteen hundred and thirty-eight.*
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That so much of the sixth section of an act entitled, "An act to provide for the support of the Military Academy of the United States for the year eighteen hundred and thirty-eight, and for other purposes," as requires the Secretary of the Treasury to invest the anual interest accruing on the investment of the money arising from the bequest of the late James Smithson, of London, in the stocks of States, be, and the same is hereby, repealed. And the Secretary of the Treasury shall, until Congress shall appropriate said accruing interest to the purposes prescribed by the testator for the increase and diffusion of knowledge among men, invest said accruing interest in any stock of the United States bearing a rate of interest not less than five per centum per annum.
>
> Sec. 2. *And be it further enacted,* That all other funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall in like manner be invested in stocks of the United States, bearing a like rate of interest.
>
> Sec. 3. *And be in further enacted,* That the three clerks, authorized by the act of June twenty-third, eighteen hundred and thirty-six, "to regulate the deposits of the public money," be, and hereby are, directed to be retained and employed in the Treasury Department, as provided in said act, until the state of the public business becomes such that their services can conveniently be dispensed with.

The reliance by the Indians and the Commission on the 1841 Act as authority for the award of simple and compound interest on I.M.P.L. Funds is misplaced. In the first place, the Act did not expressly require the Government to pay interest to Indian tribes or to anyone else. It was merely a directive to the appropriate officers of the Government holding trust funds that were *required* by treaty, contract, or statute to be invested, to invest them *only* in stocks of the United States, bearing interest at not less than five percent per annum. The primary purpose of the Act was to prevent any future investment of trust funds in state stocks or bonds

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Thus the Act did not create any obligation on the Government to pay interest on trust funds, but only provided *where* they must be invested if any statute or treaty required them to be productive. The reason for the passage of the Act and its purpose can be better understood by a brief consideration of the economic and financial conditions that existed in the country immediately prior to and at the time of its enactment.

On January 9, 1837, Congress enacted a statute (5 Stat. 135) that provided that the proceeds from lands ceded by Indians to the United States should be paid into the Treasury and if the treaties required them to be invested, such investments were to be made under the direction of the President. By 1838 there were 13 Indian trust funds in this category and all of them were invested in state bonds. However, soon after the 1837 Act was passed, a severe economic depression occurred throughout the Nation (called a panic in those days), and within a matter of weeks after the passage of the Act most banks suspended specie payments. Many states defaulted on their bonds including Tennessee, Alabama, Mississippi, and Maryland. This depression was still going on in 1841 and afterwards.

It was against this background that Congress considered changing the law that would allow trust funds to be invested in state bonds, because Congress was genuinely concerned about the default of the states on their bonds. Congressman John Quincy Adams (formerly President Adams) introduced a resolution in the Congress providing:

> That the further investment of any public funds of the United States in stocks of the several states ought forthwith to be prohibited by law.[2]

Because of the depression (panic), the default by various states on their bonds, and the deep concern of Congress with reference to Government trust funds that were invested in state bonds, the Congress enacted the Act of 1841. The sole purpose of the Act was to prohibit future investment of trust funds, that were required to be invested, in state bonds, and to accomplish this purpose the Act required such funds to be invested in bonds of the United States.

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[2] Cong. Globe, Sept. 1, 1841 (B-3).

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At the time the Act was passed in 1841 there were very few I.M.P.L. Funds in existence and those that did exist were in the hands of local Government agents for use by them for the benefit of Indians on a day to day basis. None of these funds were on deposit in the Treasury at that time. The Congress could not have intended that the 1841 Act apply to I.M.P.L. Funds because they scarcely existed, were not in the Treasury, and were not capable of being invested.

Furthermore, in 1841 there were 28 Indian funds held in trust by the Government, all of which had been specifically designated as productive by Congress, or the President had been given authority by Congress to invest them. These were the funds which the Act required to be invested in United States bonds and their investment in state bonds was prohibited.

During the years from 1841 to 1930, no one in the Executive Department of the Government considered the 1841 statute as authority to invest Indian trust funds nor as a law requiring the Government to pay interest on such funds. Subsequent to 1841, the Government continued to make treaties with Indians and enacted statutes in which Indian funds created thereby were required to be invested. These funds were invested according to the provisions of these later treaties and statutes. Not once in 130 years was the 1841 statute cited as authority to invest Indian trust funds that were required to be made productive by treaties or statutes made or enacted after 1841. This long administrative practice by the Executive Department charged with handling and investing Indian trust funds, which was concurred in by Congress, is entitled to great weight in determining the intent of Congress when it enacted the 1841 statute. In this regard, the Supreme Court held in *United States* v. *Jackson*, 280 U.S. 183 (1930):

> It is a familiar rule of statutory construction that great weight is properly to be given to the construction consistently given to a statute by the Executive Department charged with its administration. *United States* v. *Cerecedo Hermanos y Compania*, 209 U.S. 337: *Robertson* v. *Downing*, 127 U.S. 607; *United States* v. *Healey*, 160 U.S. 136; and such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required. * * * [*Id.* at 193.]

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During the more than 130 years the 1841 statute has been in existence, no court that we know of has allowed interest on a claim against the United States in a non-eminent domain case unless there was a contract, treaty, or statute (other than the 1841 statute) that expressly provided for interest. Every case we have cited in this opinion denying interest has been decided since the 1841 Act was passed. During this long period of time it has been the universally accepted rule that the requirements of the no-interest rule be met if interest is to be allowed. For instance, in the dissenting opinion of Judge Davis, concurred in by Judge Durfee, of our court in *Peoria Tribe of Indians* v. *United States*, 177 Ct. Cl. 762, 369 F. 2d 1001 (1966), *rev'd*, 390 U.S. 468 (1968), he stated:

> I join in the court's opinion on the first claim, but dissent from the disposition of the *demand for interest* on the \$172,762.04 awarded by the Indian Claims Commission.
>
> The sole ground for this claim is Article 7 of the 1854 Treaty, 10 Stat. 1084, which provided:
>
> > And as the amount of the annual receipts from the sales of their lands, cannot now be ascertained, it is agreed that the President may, from time to time, and upon consultation with said Indians, determine how much of the net proceeds of said sales shall be paid them, and how much shall be invested in safe and profitable stocks, the interest to be annually paid to them, or expended for their benefit and improvement.
>
> *It is agreed that if this is read as containing an express provision for interest appellants can recover, otherwise not.* See *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48, 49 (1951); *Confederated Salish and Kootenai Tribes* v. *United States*, 175 Ct. Cl. 451, 454 (1966), *cert. denied*, 385 U.S. 921. * * * [Emphasis supplied.] [*Id.* at 770–71, 369 F. 2d at 1006.]

At that time the 1841 statute had been in existence for over 125 years, but no attention was paid to it. The above statement was a correct one, but it would not have been correct if the 1841 Act required the payment of interest as the Indians contend in the instant case.

During the long period of time that the 1841 statute has been on the books, no court that has considered it has held

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that the Act required the Government to pay interest on any trust fund unless there was a contract, treaty, or statute (other than the 1841 Act) requiring the payment of interest.

The case of *United States ex rel. Angarica* v. *Bayard*, 4 Mackey 310 (D.C. Sup. Ct. 1885), *aff'd*, 127 U.S. 251 (1888), standing alone is sufficient authority to overturn the decision of the Commission in the instant case. In that case the Government collected a sum of money in arbitration proceedings from Spain for plaintiff Angarica for injuries and damages caused to her by Spain while in Cuba. The Government paid all of the money to Angarica except $41,129.74, which is retained and invested until such time as Spain paid the expenses of arbitration. When Spain paid these expenses, the Government paid the $41,129.74 to Angarica but did not pay her the interest it had earned. She sued for the interest, claiming that the 1841 statute (involved in the instant suit) required the Government to pay her the interest. The Supreme Court of the District of Columbia, after quoting the 1841 statute, stated:

> * * * At the time of the enactment of 1841 there existed certain treaties with the Indians, containing stipulations for the payment to them, annually, of interest upon the proceeds of lands ceded by them; and it had already been provided by the act of January 9, 1837 (5 Stat., 135), which is now embodied in the Revised Statutes as section 2096, that these funds should be invested in securities at not less than five percent interest. *It was clearly for trusts of this definite character, established as we have said, by law, that the act of 1841 proposed to establish a general system.* This is especially indicated by the exception in that act of cases regulated by treaty. The reference is to these Indian treaty funds. *We think, then, that the statute did not apply to the transaction in question*, and it is evident that the executive did not propose to conform to its requirements. [Emphasis supplied.] [*Id.* at 324.]

The court denied Angarica's suit for interest and dismissed her petition. It is clear from the above statement of the court that the 1841 Act as regards Indian trust funds was limited to "certain treaties with the Indians, containing stipulations for the payment to them annually of interest upon the proceeds of lands ceded by them," and that "it was clearly for

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trusts of this definite character, established * * * by law" that the Act of 1841 applied, and not otherwise.

The Supreme Court affirmed the *Angarica* case in 127 U.S. 251 (1888). In its opinion the Court said:

> * * * It has been established, as a general rule, in the practice of the government, that interest is not allowed on claims against it, whether * * * they arise in the ordinary business of administration or under private acts of relief, * * *. [*Id.* at 260.]

In support of this statement, the Court cited eleven opinions of the Attorney General: 1, 268; 1, 550; 1, 554; 3, 635; 4, 14; 4, 136; 4, 286; 5, 105; 7, 523; 9, 57; and 9, 449. The Court went on to say:

> Not only is this the general principle and settled rule of the executive department of the government, but it has been the rule of the legislative department, because Congress though well knowing the rule observed at the Treasury, and frequently invited to change it, has refused to pass any general law for the allowance and payment of interest on claims against the government. * * * [*Id.* at 260.]

It is particularly significant that the Supreme Court stated that Congress well knew the general rule of no-interest on claims against the Government and had been invited frequently to change it, but had refused to do so. At that time (1888) the 1841 statute had been in existence for 47 years. The law was definitely established by this decision of the Supreme Court that the 1841 Act applied only to funds created by a treaty or by a specific statute requiring the payment of interest. The decision of the Commission in the instant case is in direct conflict with the decisions of the Supreme Court of the District of Columbia and of the Supreme Court in the *Angarica* case.

But we do not have to stop here. Other courts have considered the 1841 statute and have handed down decisions which directly conflict with the decision of the Commission in this case. In *Omaha Tribe of Indians* v. *United States*, 53 Ct. Cl. 549 (1918), *rev'd in part and aff'd in part*, 253 U.S. 275 (1920), the court awarded judgment to the Indians for $18,202.19 representing default by two Government agents in disbursing treaty funds, but did not award inter-

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est on the claim. On appeal to the Supreme Court the Indians sought to recover the interest, quoting the 1841 statute and making essentially the same arguments made by the Indians and the Commission in the instant case.[8] However, the Supreme Court rejected the arguments of the Omahas and refused to allow them interest. This decision was handed down 30 years after the *Angarica* decision, but to the same effect. The 1841 statute had been in existence for 77 years at this time (1918).

In *Cherokee Nation* v. *United States*, 270 U.S. 476 (1926), the Supreme Court refused to grant interest on interest although the Cherokees urged that it do so on the basis of the 1841 statute. In that case the Supreme Court said:

> When we consider the rule requiring an express provision of contract or statute to justify the imposition of interest in adjudicating any claim against the United States, we can find nothing in the circumstances of this case to increase the interest as adjudged. * * * The only contractual obligation here is for simple five per cent. interest until payment.
>
> * * * * *
>
> And by § 3659 of the Revised Statutes, re-enacting § 2 of the Act of Congress of September 11, 1841, 5 Stat. 465, which provides:
> "All funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall be invested in stocks of the United States, bearing a rate of interest not less than five per centum per annum."
> It is urged that the largest item, of $1,111,284.70, was taken out of a $5,000,000 trust fund held by the United States for the benefit of the Cherokees, and therefore that it should be treated as if it were always in the Treasury of the United States, held in trust for the Indians, and as if the United States had collected the interest thereon out of the invested stocks and had refused to pay it over as annuities to the Indians. *This claim proves too much. It would require compound interest brought about by annual or semi-annual rests for near a century, an amount that the Solicitor General suggests would be equal to the National debt.* The argument is shown to be wholly without support in the circumstance that the Cherokees and the United States, by the resolution of the Senate in 1850, agreed upon the interest for such debts as that of five per cent. until paid. * * * [Emphasis supplied.] [*Id.* at 490, 492.]

[8] See Omaha Brief, Record and Briefs in U.S. cases, U.S. Supreme Court, October 1919 Term, Vol. 29, Dept. of Justice Library.

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It is to be observed that the Supreme Court was well aware of the provisions of the Act of 1841. Also, it should be pointed out that the 1841 Act speaks of simple interest as well as interest on interest (compound interest). Here we find the Supreme Court holding in no uncertain terms that the 1841 Act does not require compound interest to be paid *because* the *treaty* only *required* simple interest at five percent. At the time of this decision (1926) the 1841 Act had been in existence for 85 years. It cannot be said that the Supreme Court was ignorant of its existence or of its provisions because it is quoted in the Court's opinion. Under these circumstances, it is especially significant that the Court recognizes and repeats the no-interest rule in its opinion when it said "When we consider the rule requiring an *express provision of contract or statute* to justify the imposition of interest in adjudicating any claim against the United States * * *. The only *contractual obligation here* is for simple five per cent. interest * * *." [Emphasis supplied.] [270 U.S. at 490.] It must be concluded that the decision of the Commission is in direct conflict with the *Cherokee* decision, because if the 1841 Act does not require the payment of compound interest by the United States in the absence of a treaty or statute so providing, as the Supreme Court holds, by the same rule simple interest would not be required to be paid under like circumstances, either. The Commission erred in allowing simple interest, as well as compound interest, under the 1841 statute in this case.

In *United States* v. *Blackfeather*, 155 U.S. 180, 192 (1894), the 1841 statute is mentioned in passing, but the Court allowed five percent interest because a treaty in that case required it to be paid and not because of the 1841 statute. A similar result occurred in *Ottawa & Chippewa Indians* v. *United States*, 42 Ct. Cl. 240 (1907). In that case the court noticed the 1841 Act but awarded simple interest at five percent only because the treaty in that case expressly required it. Thus, it can be seen that *Blackfeather* and *Ottawa & Chip-*

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pewa Indians are within an exception to the no-interest rule and are of no help to the Indians or the Commission in the instant case.

The only other case we have found that considers the 1841 Act is our own decision in *Bonnar* v. *United States*, 194 Ct. Cl. 103, 438 F. 2d 540 (1971). In that case the alien property custodian had seized and sold property under the Trading with the Enemy Act, 50 U.S.C. App. § 9(a) (1970) during the second world war and held the proceeds in trust without investing it. After the war the owners sued for and were given a judgment for the proceeds of the sale of their property. They also claimed interest on such proceeds under the 1841 Act, now codified as 31 U.S.C. § 547(a), but we denied them a recovery of the interest. As to the interest, we held in an opinion written by Judge Durfee of our court as follows:

> Plaintiffs' final argument for interest requires us to consider the 1962 amendment to § 9(a) of the Act which directs that the proceeds of sale "shall be held *in trust* by the Secretary of the Treasury", * * * [Emphasis by Judge Durfee] 50 U.S.C. App. § 9(a) (1964), in conjunction with 31 U.S.C. § 547(a) (1964), which provides:
>
> > *All funds held in trust* by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, *shall be invested* in stocks of the United States, bearing a rate of interest not less than 5 per centum per annum. [Emphasis by Judge Durfee.]
>
> From these statutes and some familiar principles of trust law regarding the obligation of a trustee to invest trust funds (see Restatement, 2d, Trusts, § 181), plaintiffs' counsel conclude that the Government has been under a duty to invest the sales proceeds in question, and that, if the Government has not done so, then it has been enjoying "the economic benefits of an interest-free loan." *To this argument, we have two responses. First, § 9(a) of the Act could have specifically referred to 31 U.S.C. § 547(a), or required the Treasurer to invest the proceeds of any sale or liquidation. However, that section makes no such reference, and we regard this as a strong indication that Congress intended to limit recovery to the allocated sales proceeds.* [Emphasis supplied.] Second, and most importantly, this question was carefully considered in *Gmo, Niehaus & Co.* v. *United States*, 179 Ct. Cl. 232, 373 F. 2d 944 (1967), which was decided after the Act was amended in 1962, and it was answered adversely to plaintiffs' contentions. *Niehaus* involved the recovery of damages by plaintiffs on a claim for the value of money or property unlawfully appropriated by vesting under the Trading With the Enemy Act. Particularly pertinent is the court's discussion of defendant's liability for any post-sale increment. In that regard, the court stated:
>
> > In this connection, it should be noted that Section 7(c) of the Trading With the Enemy Act, as amended (50 U.S.C. App. § 7(c) (1964)), provides that in a case involving the unlawful vesting and the subsequent sale by the Alien Property Custodian of the property of a person who was not an enemy national, any recovery by the owner of the property "shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States." * * * Although this limitation of the Trading With the Enemy Act may not be strictly applicable in terms to plaintiffs' case, we should be governed by *its indication of the Congressional policy as to maximum recovery. Neither the post-sale increment in value nor interest is recoverable under Section 7(c), and neither should be recoverable here.* [Emphasis by Judge Durfee.] *Cf. Sac & Fox Tribe of Indians of Oklahoma* v. *United States*, decided this day, Part VI of that opinion, *ante*, p. 24.
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> > *   *   *   *   *
> >
> > * * * *In non-eminent domain cases, the normal rule is that interest is not recoverable unless authorized by statute or contract, 28 U.S.C. § 2516(a). In this instance there is neither statutory nor contractual authorization.* [Emphasis supplied.] *On the contrary, Section 7(c) of the Trading With the Enemy Act looks the other way.* [Emphasis by Judge Durfee.] [179 Ct. Cl. at 262–63, 373 F. 2d 961–62.]
>
> Plaintiffs allude to certain factual differences between *Niehaus* and the instant case, but none dilute the full force and effect of the court's general interpretation of § 7(c) of the Act.
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> In the absence of compelling evidence to the contrary, we must always be guided by the Congressional intent which, in this instance, is clearly that *the Government must specifically consent to be liable for interest in ex-*

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press terms, rather than by implication, except in the most extreme cases, such as *Henkels*, in which an alternate approach is desirable and necessary to avoid a serious inequity, *i.e.*, unjust enrichment. Therefore *plaintiffs are not entitled to interest on the allocated sales proceeds of their shares of GDC stock*. [Emphasis supplied.] [194 Ct. Cl. at 163–64, 438 F. 2d at 572–73.]

As applied to the instant case, the first reason we gave in *Bonnar* for denying interest could be paraphrased with reference to the 1883 Act, which placed the I.M.P.L. Funds in the instant case in trust in the Treasury for the first time, as follows:

> The 1883 Act could have specifically referred to the 1841 Act, or required the Treasurer to invest the I.M.P.L. Funds. However, the 1883 Act makes no such reference, and we regard this as a strong indication that Congress intended that the Indians would receive only the amount of the I.M.P.L. Funds deposited in the Treasury.

Our holding in that case that "the Government must specifically consent to be liable for interest in express terms, rather than by implication" is very significant. We were, of course, saying that the efforts of the plaintiff to recover interest on the theory that it was allowed *by implication* under the 1841 statute would not be approved. The courts have held over and over again, as shown by the decisions cited above, that interest on a claim against the Government will not be allowed *by implication* but must be expressly provided for in a treaty or statute. The decision in *Bonnar* is squarely against the Indians' claim for interest in this case, and the order of the Commission allowing interest is in direct conflict with that decision.

In the foregoing paragraphs, we have reviewed every case we have been able to find that has mentioned, noticed or considered interest on claims against the Government under the 1841 statute. All of them that have passed on the meaning of the Act have denied claims for interest such as those asserted by the Indians on I.M.P.L. Funds in this case.

One other case should be mentioned, although it does not involve the 1841 statute, it does contain a claim for interest on I.M.P.L. Funds as in the instant case. We refer to the

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case of *Creek Nation* v. *United States*, 78 Ct. Cl. 474 (1933). In that case the Creeks recovered a judgment against the Government for $144,106.01. They claimed interest in the sum of $1,401,195.01. The facts showed that the Creeks claimed interest on the funds that were carried on the books of the Treasury as follows: (1) General Creek fund, (2) Interest on General Creek fund, (3) I.M.P.L. Funds, and (4) Interest on Creek moneys on deposit in banks. There was a treaty with the Creeks that required the payment of interest on the "General Creek Fund," but not on the other funds. The Creeks contended that the I.M.P.L. Funds should have been placed in the "General Creek Fund" and interest paid thereon. The court rejected this theory and denied interest on the I.M.P.L. Funds, saying:

> * * * Moneys arising from the sources stated [IMPL funds] clearly could not be credited to the interest-bearing "Creek general fund." * * * There being no treaty or statutory obligation on the part of the United States to pay interest on Creek tribal funds, [including IMPL funds] other than those belonging to the "Creek general fund", interest can be allowed only on such of the unauthorized disbursements as were made from that fund. [*Id.* at 505.]

Based on the facts described above and the court decisions we have cited, we hold that the purpose of the 1841 statute was to prohibit investment of United States trust funds, that were required by treaty or statute to be productive, in state bonds and to require them to be invested in United States securities, and that the Act did not require the payment by the United States of interest on any fund that was not expressly required to be productive by a contract, treaty, or statute. Consequently, the Indians in the instant case are not entitled to recover interest from the Government on their I.M.P.L. Funds. The 1841 statute simply does not apply to the I.M.P.L. Funds involved in the instant case. The statute is a rather obscure one, having been enacted over 133 years ago, and during that long period of time no administrative officer of the Government has ever allowed or paid interest because of its provisions, nor has any court ever allowed interest on a claim against the Government because of it. The statute was directory only as

to where trust funds that were otherwise required to be made productive could be invested.

The Commission is clearly in error in awarding compound interest in this case. Even when simple interest is required to be paid by treaty or statute, all of the cases hold that compound interest cannot be allowed against the Government. In *Menominee Tribe of Indians* v. *United States*, 97 Ct. Cl. 158, 162 (1942) we held:

> It is well settled that the United States cannot be charged with interest except where liability therefor is clearly imposed by the statute or assumed by contract. *United States* v. *North Carolina*, 136 U.S. 211; *Cherokee Nation* v. *United States*, 270 U.S. 476; *United States* v. *Worley, Administratrix, et al.*, 281 U.S. 339; *The Ute Indians* v. *United States*, 45 C. Cls. 440, 470. In *Cherokee Nation* v. *United States*, *supra*, the court said, at pp. 490, 491:
>
> > In view of the care with which Congress and this Court in interpretation of the legislative will, have limited the collection of simple interest against the Government, *a fortiori* must compound interest be denied to appellant unless provision therefor is made in the contract of 1891, or in the statute of 1919 authorizing this suit, and it is to be found in neither.
>
> The cases cited make it clear that a statute consenting to payment of interest refers to simple interest only, and *any obligation to pay compound interest cannot be implied from general words, but must be based upon clear and unequivocal language leaving no doubt as to the intention of Congress to depart from the general rule so announced as to the right to charge and collect interest from the Government.* The Act of February 12, 1929, *expressly provided for only "simple interest"* upon money held in trust fund accounts, and *this language may not be interpreted as intending to obligate the United States to pay interest upon interest* previously credited upon other interest-bearing funds or accounts. The term "simple interest" has a well-established meaning. [Emphasis supplied.]

In that case we held further:

> We are of opinion that plaintiff is not entitled under the provisions of the Act of February 12, 1929, to recover interest on interest. * * * [*Id.* at 161.]

In *Ute Indians* v. *United States*, 45 Ct. Cl. 440, 470 (1910) we held that compound interest could not be allowed against the Government:

> No interest, either simple or compound, can be collected from a sovereign except by its consent. (*United States* v. *North Carolina*, 136 U.S. 211.) In the case at bar the soverign has agreed to pay interest, and that means simple interest only. But the plaintiffs seek to charge the defendants with compound interest in this case on the ground that the money so received constituted a trust fund, and that in such cases where the fund has been improperly withheld, the trustee is penalized with compound interest. It is elementary as a general proposition, in the absence of a contract to that effect, that interest upon interest is not recoverable for the detention of money, and that is a general rule either at law or equity. (*Perley on Law of Interest*, 159, 160; *In re Ward's estate*, 73 Mich., 220, 228.) It is only where a trustee, guardian, or executor has acted in bad faith, in abuse of his trust or has been guilty of such gross negligence as to be evidence of a corrupt intention, that compound interest will be charged against him (*Barney v. Saunders*, 16 How., 535; *Perrin* v. *Leper*, 72 Mich., 446; *Vaughan* v. *Bibb*, 46 Ala., 153; *Smith* v. *Kennard*, 38 Ala., 695).
>
> *The Government* only acts through its officers and agents and thus in law can never be guilty of fraud, bad faith, or negligence; *hence it can never be penalized by being charged compound interest.* [Emphasis supplied.]

In the case of *Peoria Tribe* v. *United States*, 390 U.S. 468 (1968), the Supreme Court held that compound interest could not be allowed against the Government without its consent, saying:

> Because the United States is not liable for interest on judgments in the absence of an express consent thereto, it cannot be liable for interest on the annual income payments not made. Therefore, if an interest rate measure is adopted by the Commission, it must be simple and not compound interest. [*Id.* at 473 n. 6.]

The Supreme Court held in *Cherokee Nation* v. *United States*, 270 U.S. 476 (1926) that compound interest against the Government must be denied unless provision is made therefor in a contract or statute, saying:

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> * * * The only contractual obligation here is for simple five per cent. interest until payment.
>
> What the appellant here seeks is compound interest, that is interest on interest from 1895 until now. The general rule even as between private persons is that in the absence of a contract therefor or some statute, compound interest is not allowed to be computed upon a debt. *Whitcomb* v. *Harris*, 90 Me. 206; *Bradley* v. *Merrill*, 91 Me. 340; *Ellis* v. *Sullivan*, 241 Mass. 60, 64; *Tisbury* v. *Vineyard Haven Water Company*, 193 Mass. 196; *Lewin* v. *Folsom*, 171 Mass. 188, 192; *Wallace* v. *Glaser*, 82 Mich. 190; *Blanchard* v. *Dominion National Bank*, 130 Va. 633, 637; *Finger* v. *McCaughey*, 114 Cal. 64, 66; *Cullen* v. *Whitham*, 33 Wash. 366, 368. In view of the care with which Congress, and this Court in interpretation of the legislative will, have limited the collection of simple interest against the Government, *a fortiori* must compound interest be denied to appellant unless provision therefor is made in the contract of 1891, or in the statute of 1919 authorizing this suit, and it is to be found in neither. [*Id.* at 490–91.]

See also Creek Nation v. *United States*, *supra*, and *United States* v. *Blackfeather*, *supra*. All of the cases hold that even where a treaty or statute require the payment of interest, only simple interest is intended and compound interest cannot be awarded against the Government.

The Commission asserts that aside from the 1841 statute, the Indian Claims Commission Act authorizes it to award simple interest and compound interest to the Indians against the Government in this case. We do not agree. The Indian Claims Commission Act nowhere authorizes the Commission to award any kind of interest against the Government. All of the cases that have considered the question have ruled the other way. *See Osage Nation of Indians* v. *United States*, 119 Ct. Cl. 592, 671–72, 97 F. Supp. 381, 424–25, *cert. denied*, 342 U.S. 896 (1951); *Kiowa, Comanche & Apache Tribes* v. *United States*, 143 Ct. Cl. 534, 543–44, 163 F. Supp. 603, 609–10 (1958); *Blackfeet & Gros Ventre Tribes* v. *United States*, 2 Ind. Cl. Comm. 302, 314 (1952), *aff'd*, 127 Ct. Cl. 807, 119 F. Supp. 161, *cert. denied*, 348 U.S. 835 (1954); *Nez Perce Tribe of Indians* v. *United States*, 194 Ct. Cl. 490, 499, *cert. denied*, 404 U.S. 872 (1971); and *Loyal Band of Creek Indians* v. *United States*, 118 Ct. Cl. 373, 382–83, 97 F. Supp. 426, 431, *cert. denied*, 342 U.S. 813 (1951).

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We hold that the Indian Claims Commission Act does not authorize the Commission to award simple interest or compound interest on a claim against the Government in any non-eminent domain case unless a contract, treaty, or statute expressly provides for the payment of such interest; and that there is no such contract, treaty, or statute in the instant case.

The serious consequences of the decision of the Commission in this case which allows simple interest and compound interest to the Indians against the Government on their claims from 1883 to 1930 on the basis of the 1841 statute cannot be overemphasized. The decision would open the doors to claims for simple and compound interest of beneficiaries of every trust fund, Indian and otherwise, held by the United States from 1841 to 1975, or until payment, and the ultimate cost to the Government could be an astronomical amount. The Government estimates it could amount to billions of dollars. We have no way of determining whether or not this is correct, but it stands to reason that the potential cost of the decision would be tremendous. This possible enormous cost to the Government is naturally of great concern to this court, although it does not govern the outcome of this suit. Nevertheless, it has caused us to consider the decision of the Commission with great care.

As stated in the beginning of this opinion, the Te-Moaks claimed that they should be awarded interest on shortages in fulfillment of the Government's obligations under the Treaty of October 1, 1863, 18 Stat. 689. The Commission correctly treated these shortages in payments as breaches of contractual obligations rather than as breaches of trust and denied interest on the shortages. *See United States* v. *Omaha Indians*, 253 U.S. 275 (1920), *aff'g in part, rev'g in part*, 53 Ct. Cl. 549 (1918); *Confederate Salish & Kootenai Tribes* v. *United States*, 175 Ct. Cl. 451, *cert. denied*, 385 U.S. 921 (1966); *Rogue River Tribe of Indians* v. *United States*, 105 Ct. Cl. 495, 552–53, 64 F. Supp. 339, 344 (1946); *Choctaw Nation* v. *United States*, 91 Ct. Cl. 320, 402 (1940), *cert. denied*, 312 U.S. 695 (1941); *Tillson* v. *United States*, 100 U.S. 43, 47 (1879); *Ramsey* v. *United States*, 121 Ct. Cl. 426, 431–32, 101 F. Supp. 353, 356 (1951), *cert. denied*, 343 U.S. 977 (1952); *Peoria Tribe of Indians*, 177 Ct. Cl. 762,

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369 F. 2d 1001 (1966), *rev'd on other grounds*, 390 U.S. 468 (1968); and decision of the Comptroller General, A-27308 of May 31, 1929. In this connection, we held in *Confederated Salish & Kootenai Tribes* v. *United States*, *supra:*

> * * * The taking away of *contractual rights*, via a rupture of the contract, is of course not equivalent to a taking of *property* under the Fifth Amendment. It is commonplace for the defendant to be held in this court for having gone back on a promise and thus denied a plaintiff his rights. *Interest is not paid on an award of that kind for a breach of contract. Choctaw Nation* v. *United States*, 91 Ct. Cl. 320, 402–03 (1940), *cert. denied*, 312 U.S. 695 (1941). * * * [Footnote omitted.] [Emphasis supplied.] [*Id.* at 455.]

Again in *Peoria Tribe of Indians* v. *United States*, *supra*, we held:

> Admittedly no interest is allowable for the breach of an obligation to pay over money to the Indians. *Confederated Salish and Kootenai Tribes* v. *United States*, 175 Ct. Cl. 451 (1966), *cert. denied*, 385 U.S. 921 and *Ramsey* v. *United States*, 121 Ct. Cl. 426, 431–32, 101 F. Supp. 353 (1951), *cert. denied*, 343 U.S. 977 (1952). * * * [*Id.* at 770 n. 9, 369 F. 2d. at 1006.]

The Commission was correct in denying the Te-Moaks interest on the treaty shortages, and its decision in that regard should be affirmed.

Accordingly, the decision and order of the Commission awarding simple interest and compound interest, whether called interest or damages, to the appellee Indian tribes on I.M.P.L. Funds from 1883 to 1930 is reversed.

The decision and order of the Commission denying the claim of the Te-Moaks, cross-appellants, for interest on shortages in payment by the Government of its obligations under the Treaty of October 1, 1863, is affirmed.

The case is remanded to the Indian Claims Commission for further proceedings in accordance with this opinion.

Affirmed in part,
reversed in part,
and remanded.

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NICHOLS, *Judge*, concurring:

I concur in the result. The opinion accepts without question the Government's explanation of the 1841 Act. Though an air of certainty in a judicial opinion is a desirable quality, in this instance I deem it overdone. I believe reasonable persons can differ, as they have. On the other hand, the dissent would fasten on the Government the duties and obligations of a testamentary trustee with respect to all Indian funds it collected, managed, and disbursed prior to 1930. That role resembles in some respects that of a trustee, but it also looks like that of a banker. Unlike, *e.g.*, *United States* v. *Sioux Nation of Indians*, *et al.*, 207 Ct. Cl. ——— (App. No. 16–74, decided June 25, 1975), it is not possible to point to any contemporary pronouncement, by Indians or whites, that the dealings with these funds essentially as bank checking accounts were unlawful or reflected a lack of fair and honorable dealings. The then state of the authorities makes it unlikely anyone would have so concluded had he studied the matter. The dissent does not construe the 1841 statute literally, any more than the majority does. If applicable, and taken literally, the statute would have impounded all IMPL funds for investment in United States "stocks", not just the excess over that needed for Indian support.

I simply cannot believe the Indian Claims Commission Act, 25 U.S.C. § 70, was written to fix on the United States a penalty liability of this speculative and dubious character.

DAVIS, *Judge*, dissenting in part:

The appeal is not from a simple accounting decision of the Indian Claims Commission, in which the disagreement of the parties revolves around technical accounting standards or factual differences. Rather, it is an appeal from grant of an accounting request in the most traditional sense—a claim that certain tribal rights (granted by statute) have been ignored by the United States, that discovery is required to determine the extent of the breach, and a demand that the defendant be held in damages for its actions. *See* 1 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §§ 464–65 (1836).

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At the heart of the matter, particularly for the period before 1918 (*see Cheyenne-Arapaho Tribes* v. *United States*, 206 Ct. Cl. ——, 512 F. 2d 1390 (1975)),[1] is the proper interpretation of the Act of September 11, 1841, ch. 25, 5 Stat. 465, *now codified at* 31 U.S.C. § 547a. I agree with the majority that without a statutory duty to make trust funds productive, coupled with a jurisdictional act (here the Indian Claims Commission Act, 25 U.S.C. §§ 70 et seq.) giving the appellants a forum in which to bring their action, the United States may incur trust duties which are unenforceable. *See United States* ex rel. *Angarica* v. *Bayard*, 4 Mackey 310, 327–28 (D.C. Sup. Ct. 1885), *aff'd*, 127 U.S. 251 (1888). However, to me the plain words of the 1841 statute required defendant to invest plaintiffs' "Indian Money, Proceeds of Labor" (IMPL) funds and the interest accruing, at a rate of not less than five percent per annum. Having failed to do so, the defendant must be held for damages.

The opinion of the Indian Claims Commission describes in great detail the history of the 1841 law, both prior and subsequent to its passage, and there is no reason to repeat the bulk of what is said there. *See Te-Moak Bands of Western Shoshone Indians* v. *United States*, 31 Ind. Cl. Comm. 427 (1973). The statute, as noted in the court's opinion, is extremely short and simple, and concerned largely with investments to be made with the money bequeathed to the United States by James Smithson. In section 1, the act repealed that part of an earlier statute which had provided that interest accruing on the funds would be invested in state "stocks,"[2] and provided that the interest would be in-

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[1] In 1918, upon an appeal by the Secretary of the Interior that he be allowed to invest idle Indian funds in Liberty Bonds, to help both the Indians and the Treasury, Congress passed a law allowing the investment of "the trust funds of any tribe or individual Indian in United States Government bonds, * * *" Act of May 25, 1918, ch. 86, § 28, 40 Stat. 591; *see* 55 CONG. REC. 3438 (1917). Legislative history of this statute suggests strongly that IMPL funds were meant to be included in the monies which were available for such investment. *See ibid; Hearings on S. 8272 Before the Senate Comm. on Indian Affairs,* 64th Cong., 2d Sess. 46 (1917) (Testimony of Ass't Comm'r of Indian Affairs); COMBINED STATEMENT OF THE RECEIPTS AND DISBURSEMENTS, BALANCES, ETC. OF THE UNITED STATES DURING THE FISCAL YEAR ENDED JUNE 30, 1917 at 140–42 (1918). It appears that the statute went unused and the funds remained fallow in the Treasury. *See* S. REP. No. 1396, 70th Cong., 2d Sess. 1–2 (1929).

[2] During this period, "stock" included debt instruments.

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vested "in any stock of the United States bearing a rate of interest of not less than five per centum per annum." Section 2 of the act then provided:

> That all other funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall in like manner be invested in stocks of the United States, bearing a like rate of interest.

While the primary purpose of the legislation was undoubtedly to protect the Smithson bequest from disappearing as states defaulted on their bonds, the language of section 2 is broader in two respects. First, it applies to "all other funds held in trust," and second, it directs investment at a specified rate of return, not simply, as the Government contends, investment in United States securities. This point of a set rate of return was not slipped into the legislation unwittingly—the original House bill did not contain such a provision, which was added by the Senate Finance Committee. The "when not otherwise required by treaty" language was also added in the Senate, in response to the specific objections of Senator Sevier that the act conflicted with the provisions of earlier treaties. 10 CONG. GLOBE 422 (1841). This addition makes extremely questionable the Government's current contention that the 1841 statute is applicable only when a treaty or statute already required the investment of funds, since this was precisely the case excluded (to the extent of any inconsistency) from the statute on Senator Sevier's request.

As the opinion of the Indian Claims Commission shows, the history of administrative compliance with even the part of the 1841 act requiring that trust funds be invested in United States stocks was extremely spotty. There were almost as many times after 1841 when new or matured trust funds (from treaties not requiring investment in state stocks) were invested in state rather than United States securities as there were instances when such investment was refused because of the 1841 mandate. 31 Ind. Cl. Comm. at 474–77. An inconsistent administrative interpretation of a statute is entitled to little deference by this court, particularly where the statute itself is simple and straight-forward. *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411

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U.S. 726, 745–46 (1973); *see United Housing Foundation, Inc.* v. *Milton Forman*, — U.S. —, — n. 24 (1975). The court stresses the failure of the authorities to apply the act to the IPML funds but that seems to me because the statute was neglected not that a conscious and reasoned decision was made that it failed to govern. The administrative practice is not helpful, one way or the other.

We do, however, have other sources to turn to for an indication of what the statute meant to those closer to its passage then we are. The major evidence of the legislative reading of the 1841 statute is in the debates surrounding passage of the Act of April 1, 1880, ch. 41, 21 Stat. 70, which authorized the payment of interest by the Treasury in lieu of investment for certain classes of Indian funds.[8] By 1880, a problem Senator Calhoun had foreseen in 1841 arose—there were no available United States securities which paid interest of 5% or more. The draft of the law which reached the Senate floor provided that in lieu of investment, the Secretary of Interior could deposit Indian funds in the Treasury at 4 percent interest. 10 CONG. REC. 212 (1880). On the Senate floor, Senator Allison objected that such a statute would breach various treaties under which the United States had agreed to invest Indian funds at 5% *and also would be contrary to the obligation assumed in the 1841 act* which was held to be separate from and additional to obligations to invest found in various treaties. *Ibid.* at 213–15, 720. The bill was amended to delete the 4% interest provision and to provide that "the United States shall pay interest semiannually, from the date of deposit of any and all such sums in the United States Treasury, at the rate per annum stipulated by treaties *or prescribed by law*, . . ." Act of April 1, 1880, ch. 41, 21 Stat. 70 (emphasis added); *see* S. REP. No. 186, 46th Cong., 2d Sess. 1–2 (1880). While this history is of course not definitive, I find that at least the Senate, only 39 years after 1841, thought that the earlier statute created an obligation to invest *all* Indian trust funds and the interest accruing thereon, whether required by treaty or not, in United States bonds not paying less than 5% interest.

[8] There is no question that the 1880 statute does not apply to IMPL funds which are not within the delimited categories of funds covered by that act.

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Judicial construction of the 1841 statute has been almost as sparse as legislative interpretation, but what little there is supports this position. There are several cases in which the statute is merely mentioned in passing, probably because the parties in their briefs treated it as an alternative theory on a minor point. In *United States* v. *Blackfeather*, 155 U.S. 180 (1894), the Supreme Court refused to consider the Indians' claim for interest under the 1880 statute (which had been denied by the Court of Claims) because the Indians failed to cross-appeal. 155 U.S. at 186. However, the Court did cite the 1841 statute as that governing "the interest paid upon funds held in trust" without any limitation. *Ibid.* at 192. In *United States* v. *Omaha Tribe of Indians*, 253 U.S. 275 (1920), the Indians made a general equitable claim for interest based largely on the grant of equity jurisdiction in the special jurisdictional act, mentioning the 1841 Act only once. Brief of the Omaha Tribe of Indians at 21–32. The Government brief entirely ignored the 1841 statute. Government Brief at 9–12. The Supreme Court denied the interest claim, not because the 1841 statute did not apply, but because no trust fund had ever been created. 253 U.S. at 282–83.

This same theory underlay the denial of interest in *Cherokee Nation* v. *United States*, 270 U.S. 476 (1926). This was an extremely complex case in which the Cherokees claimed about $2,000,000 in essentially compound interest on claims which had earlier been decided in their favor, with interest. *United States* v. *Cherokee Nation*, 202 U.S. 101 (1906). Again, the 1841 statute was discussed only briefly, with most of the parties' energies devoted to determining what the earlier decision had meant. In addition, the parties appear to have been talking past each other. The Indians claimed that the earlier decision retroactively returned funds to admittedly interest-bearing accounts as of March 4, 1895, and that the law of 1841 provided that the rate of return on those funds should be 5%. Reply Brief of Appellant at 9–11. The Government, on the other hand, contended that there had been no constructive return to interest-bearing accounts in 1895, and therefore that if interest were to be allowed on the claims, it should be from the time of the original treaty breaches (which had occurred as early as

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1819), which would amount to an extremely large sum (contended to be "comparable in size to the national debt," but this was probably an exaggeration). Brief for the United States at 32–36.

The Supreme Court decided the issue on two grounds. First, it held that no funds had been held in trust for the Indians because the United States had *not*, either in 1819 or 1895, returned the moneys due the Indians to their trust funds in the Treasury. Second, the Court found that by an 1850 agreement, the Cherokees had agreed that interest on all debts owed them would be at 5% simple interest, and that more than this had already been paid. 270 U.S. at 492. The second theory is irrelevant to our case. However, the first theory is what distinguishes the claim of the Te-Moaks on cross-appeal from the major claim in this case. Like the Court I am of the view that where there are no funds held in trust for a tribe *even though money is due and owing under a treaty or because of defalcations*, the laws requiring either investment of trust funds or payment of interest on them are not applicable. This is so because in the absence of a trust fund, the Indians' only claim to monies due is as a debt, upon which no interest is available except where explicitly provided by statue, contract or treaty. *See Confederated Salish & Kootenai Tribes* v. *United States*, 175 Ct. Cl. 451, *cert. denied*, 385 U.S. 921 (1966) (Davis, J.)[4] An analysis of the two major Supreme Court cases holding that no interest would be allowed on a Court of Claims judgment shows that they turn on the theory that the amount due the plaintiff is due as debt, and not as beneficial owner of a trust fund such that the 1841 statute applies. *See United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585, 588–89 (1947); *Goltra* v. *United States*, 312 U.S. 203, 211 (1941).[5]

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[4] For this same reason, I disagree with the Commission's damages accounting to the extent that it "returns" disallowed disbursements to the IMPL fund before calculating damages. *Te-Moak Bands of Western Shoshone Indians* v. *United States*, 33 Ind. Cl. Comm. 417, 428 (1974).

[5] *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654 (1947), did involve a trust fund. However, neither the parties nor the Court discussed the 1841 Act—the entire claim was based on equitable grounds that interest was "right and just." *Ibid.* at 659. The trust fund there involved, moreover, was rather unusual in that it was, by the terms of the statute under which it was created, to be dissolved at the end of two years and the money to return to the United States, not the beneficial owner. Act of June 26, 1934, ch. 756, § 21, 48 Stat. 1235.

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The case in which there is the most complete discussion of the 1841 statute is *United States* ex rel *Angarica* v. *Bayard*, 127 U.S. 251 (1888), the facts of which are set out in the majority opinion. The Supreme Court never reached the issue of the applicability of the 1841 Act because it found that the money collected from the Spanish government, on which Angarica demanded interest, had been collected by the United States in its own right and not in trust for Angarica. 127 U.S. at 259. As in the *Omaha* case, *supra*, the necessary predicate for application of the 1841 law—a trust fund—was missing.

The District of Columbia Supreme Court (where the case had been brought originally) did, however, comment extensively on the 1841 statute although it too found the law inapplicable. *United States* ex rel. *Angarica* v. *Bayard*, *supra*, 4 Mackey at 322. The court found that the 1841 statute applied only to trusts which had three characteristics missing in Angarica's case:

> (1) That the funds were deposited in the Treasury rather than retained by a department.
> (2) That the funds were to be invested by the Secretary of the Treasury rather than by the head of any other department, and
> (3) That the funds could not be disbursed without congressional authorization. *Ibid.* at 324.

All these characteristics are present in the case of the IMPL funds.

When Congress, by a rider to the Deficiency Appropriations Act of 1883, ch. 141, 22 Stat. 590, required that miscellaneous revenues from Indian reservations be "covered into the Treasury for the benefit of such tribe * * *," the Secretary of the Interior and the Commissioner of Indian Affairs intended to treat the fund as the Secretary of State had treated Angarica's money—as essentially a checking account, totally under the control of the Secretary of Interior. *See* Letter from the Secretary of the Interior to the Commissioner of Indian Affairs, dated April 19, 1883; Letter from Commissioner of Indian Affairs to the Secretary of the Interior, dated November 14, 1883. The Acting Secretary of the Treasury, however, determined that the act created a fund

with the characteristics described in *Angarica*. The money was to be taken out of direct control of the department and deposited in the Treasury (this was agreed by all as the purpose of the act); investments were to be handled by the Secretary of the Treasury (under the Act of June 10, 1876, ch. 122, 19 Stat. 58, *now codified at* 25 U.S.C. § 160); and, most tellingly, the funds could not be touched by the Department of the Interior or the Indians until Congress specifically authorized such actions (*see* Letter from Acting Secretary of the Treasury to the Secretary of the Interior, dated November 26, 1883). In 1887 Congress, at the urging of the Secretary of the Interior, did make the authorization demanded by the Treasury Department, but in doing so emphasized the trust nature of the funds by declaring that the money must be used for the benefit of the tribes which had produced the revenue. Act of March 2, 1887, ch. 320, 24 Stat. 463.

This court has considered the scope of the 1841 Act twice, both times very briefly, and has reached contrary conclusions about the act's applicability to non-treaty trust funds.[6] In *Bonner* v. *United States*, 194 Ct. Cl. 103, 438 F. 2d 540 (1971), as the majority opinion notes, we rejected the act's application to funds held under the Trading with the Enemy Act, 50 U.S.C. App. § 9(a) (1970), on two grounds, the most important of which, we said, was that the Act, by its own terms, explicitly limited recovery to the net proceeds of sale. 194 Ct. Cl. at 163–64. We also stated that the Trading with the Enemy Act should have referenced the 1841 Act if that statute was meant to apply. *Ibid.* at 163. It is a maxim of construction that general statutes apply to later specific acts unless the later act is clearly inconsistent with the former. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133–34 (1974). It may well be that section 7(c) of the Trading with the Enemy Act, which limits recovery to net proceeds, *is* inconsistent with the 1841 law and that therefore the earlier statute did not apply. However, we do not have such a case here, and the failure of

[6] In *Creek Nation* v. *United States*, 78 Ct. Cl. 474 (1933), which the majority cites for the proposition that no interest is payable on IMPL funds, Majority Op. at 32–33, the Creeks argued strongly that their money should never have been put in an IMPL fund, since the Five Civilized Tribes were excluded from the 1883 Act, and never requested interest on such a fund. Plaintiff's Request for Findings of Fact and Brief at 49–51. This is another case, furthermore, in which neither party ever mentioned the 1841 Act.

the 1883 statute to make reference to the 1841 act should not bar the application of the first-passed statute.

The second case in which we have considered the 1841 Act is more on point. In *Confederated Salish & Kootenai Tribes* v. *United States*, we were asked, among other things, to decide whether interest on plaintiff's trust fund "Proceeds of Flathead Reservation, Montana" should be granted pursuant to the 1880 Statute, 25 U.S.C. § 161. It will be remembered that that statute provides that certain funds might be kept in the Treasury in lieu of investment, with interest paid "at the rate per annum stipulated by treaties or prescribed by law." No treaty or particular act of Congress required that the proceeds of the Flathead Reservation be invested or that interest be paid, although the Act of April 23, 1904, ch. 1495, § 14, 33 Stat. 305, did provide that the funds received were to be paid into the Treasury and expended "for the benefit of said Indians." The plaintiffs argued that their funds were clearly proceeds of "Indian trust lands" and therefore entitled to interest under the 1880 statute, at the rate of 5% *as provided by the law of 1841*. Motion for Instructions to the Commissioner, etc. at 1 (filed Aug. 15, 1968). The government responded that the 1841 statute was inapplicable in construing the 1880 law. Response to Motion for Instructions, etc. at 8–9 (filed Oct. 23, 1968). This court found for the plaintiff, and in doing so necessarily concluded, contrary to defendant's present assertions, that the 1841 law in applicable to funds for which no special investment provision in a law or treaty exists. Order, *Confederated Salish & Kootenai Tribes* v. *United States* (Dec. 9, 1968), *reported at* 186 Ct. Cl. 947.

That the IMPL fund created by these statutes is a trust fund is conceded by the government. Brief of United States at 47;[7] *see Cheyenne-Arapaho Tribes* v. *United States*,

[7] In 1934, Congress specifically declared the IMPL fund to be a "trust fund." Act of June 26, 1934, ch. 756, § 20(20), 48 Stat. 1233, *now codified at* 31 U.S.C. § 725s (20) (1970). While this action came after the statute providing that interest be paid on such funds, Act of June 13, 1930, ch. 483, § 2, 46 Stat. 584, neither that statute nor any other after 1887 altered the terms of the original statute which had provided that the funds were to be held "for the benefit" of the Indians. This later Congressional action, therefore, may be seen as a ratification of its earlier intent to treat IMPL funds as a trust fund.

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supra, 206 Ct. Cl. at —, 512 F. 2d at 1392. The infirmity which prevented recovery by the Omahas and Angarica, *supra*, is therefore not present here. Rather, the government relies on two other propositions to deny application to the plain letter of the 1841 statute. First, the point is made the act applies only to "trusts of a definite character," upon which a treaty or another act of Congress provided that interest should be paid or the fund invested. There are three answers to this. First, the "trusts of a definite character" language comes from the District of Columbia Supreme Court decision in *Angarica*. As we have shown, the IMPL fund falls within the class as to which that court found the 1841 Act to apply. Second, we have already rejected the argument that another treaty or act is required as a predicate for application of the 1841 Act in the *Confederated Salish* case, and that decision should govern here. Third, the terms of the statute are not so restricted and there is insufficient reason in its history to read it so narrowly.

The defendant's second ground for rejecting application of the 1841 Act is simply that it would cost too much now to penalize the government for failure to comply with the statute from 1883 to 1930.[8] Damages for failure to comply from 1883 to 1930 are the lost profits which would have resulted from the investments. Since the 1841 Act provides a *minimum* return on investment of 5% compounded, and the Indians have not cross-appealed on the Commission's failure to use a higher rate, I agree with the Commission that damages should be figured at 5% interest compounded annually, on the *actual* annual surplus in the IMPL fund. (See note 4, *supra.*) My own, admittedly rough, calculations lead me to believe that the damages payable to all Indian tribes for lost profits on the IMPL account from 1883 to 1930 will not exceed $15,000,000.[9] Even if I am mistaken in that, I remain convinced that the law is as I have previously stated in response to a similar governmental claim:

[8] Since no claim is made for damages after 1930, I leave to another day the issue whether the Act of June 13, 1930, ch. 483, § 2, 46 Stat. 584, providing simple interest at 4% on IMPL funds held in the Treasury, superseded the 1841 statute.

[9] As stated above, *supra*, note 4, these damages are calculated on the basis of actual surplus funds in the Treasury, and do not include damages on illegal disbursements.

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> It is irrelevant that an award of interest, pursuant to the [1841 statute], could increase the award to plaintiff by five or six times. If the [statute] so provides, we cannot refuse interest because the amount is relatively large. *Peoria Tribe* v. *United States*, 177 Ct. Cl. 762, 770, 775 n. 6 (1966) (Davis, J., dissenting), *rev'd*, 390 U.S. 468 (1968).

The 1841 statute provides the Indians with a right to recover within the jurisdiction created by paragraph (1) of the Indian Claims Commission Act—"claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President," 25 U.S.C. § 70a(1) (1970). This language tracks that of the early special jurisdictional statutes, and as such does not create any equitable right to enforce general trust duties undertaken by the United States where, for some reason, the 1841 statute is inapplicable. *See United States* v. *Omaha Tribe of Indians*, *supra*, 253 U.S. at 283.

However, in establishing the Indian Claims Commission Congress did not, as we have noted many times before, merely consolidate all the old special jurisdictional acts. It went further, providing a new cause of action for "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." 25 U.S.C. § 70a(5). *See Otoe and Missouria Tribe of Indians* v. *United States*, 131 Ct. Cl. 593, 602, 131 F. Supp. 265, 271, *cert. denied*, 350 U.S. 848 (1955). This does not mean that the United States has agreed to pay the Indians for all pre-1946 wrongs. *Gila River Pima-Maricopa Indian Community* v. *United States*, 190 Ct. Cl. 790, 797, 427 F. 2d 1194, 1197–98, *cert. denied*, 400 U.S. 819 (1970). We have, however, determined that such a clause does extend government liability when three conditions are met; first, that there be an express undertaking by the United States, by treaty, agreement, executive order, or statute, of a duty of trustee toward the Indians; second, that the United States has failed to meet its obligations; and third that the tribe has suffered damages as a result. *Aleut Community of St. Paul Island* v. *United States*, 202 Ct. Cl. 182, 196, 480 F. 2d 831, 838–39 (1973). These three conditions are met here, and should result in recovery by the Indians of profits

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lost by breach of fiduciary duty by the United States, although the measure of damages under traditional trust law, lost profits at simple interest, differs from that mandated by the 1841 Act. *See Ute Tribe of Indians* v. *United States*, 45 Ct. Cl. 440, 470 (1910).

In 1883, by statute, Congress declared that money admittedly belonging to the Indians would, instead of being given to the Indians, be "covered into the Treasury for the benefit of such tribe." Act of March 3, 1883, ch. 141, 22 Stat. 590. In 1887, the Secretary of the Interior was, again by statute, explicitly given the power to use these funds, but only for the benefit of the tribes on whose account the funds had originally been added to the fund. Act of March 2, 1887, ch. 320, 24 Stat. 463. These two statutes, in the most traditional sense, created a trust for the benefit of the Indians, a fact belatedly recognized by the Treasury in 1908. 2 J. Story, Commentaries on Equity Jurisprudence § 980 (1836); *see* Restatement of Trusts 2d, § 24, comm. b, illus. 1 (1959); *Te-Moak Bands of Western Shoshone Indians* v. *United States*, *supra*, 31 Ind. Cl. Comm. at 506–508.

Under standard trust law, which has remained largely constant through the last century, a trustee's duties include (unless explicitly negated by the terms of the trust, not a problem here) the obligation to make trust funds productive by investing whatever money is not required by the terms of the trust to be distributed. *See* Restatement of Trusts 2d, Introductory Note at 1, § 181 (1959). From 1883 to 1887, the terms of the statute permitted no disbursal at all, so the duty arose to make the entire amount in the fund productive. The 1887 Act amended the terms of the trust to allow the Secretary of the Interior to spend the funds in the IMPL fund for the benefit of the tribe on whose account the money was covered into the Treasury. From 1887 on, then, the duty to make funds productive was limited to surpluses remaining in the account, after charges, which would not be needed in the reasonably foreseeable future. When the annual surplus in the total IMPL fund for all Indians which, according to Treasury Department reports, fell below $1,000,000 for only one year (fiscal 1925) between 1902 and 1930 and reached to

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over $9,000,000 in fiscal 1923,[10] was left to lie fallow earning absolutely no interest, the tribes to whom portions of the fund belonged suffered sufficient damage to allow recovery under the fair and honorable dealings clause for the breach of trust. This is wholly apart from the 1841 Act and furnishes an alternative and supplementary ground for recovery by the appellees.

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[10] *See* Statement of Balances, Appropriations, and Expenditures of the Government for the Fiscal Year Ended June 30, 1902 at 98–99 (no date); *Ibid.* for the Fiscal Year Ended June 30, 1903 at 116–17 (no date); *Ibid.* for the Fiscal Year Ended June 30, 1904 at 114–15 (no date); *Ibid.* for the Fiscal Year Ended June 30, 1905 at 118–19 (no date); *Ibid.* for the Fiscal Year Ended June 30, 1906 at 108–09 (1907); *Ibid.* for the Fiscal Year Ended June 30, 1907 at 144–45 (1908); Statement of Balances, Appropriations, and Disbursements of the Government for the Fiscal Year Ended June 30, 1908 at 124–25 (1908); *Ibid.* for the Fiscal Year Ended June 30, 1909 at 138–39 (1909); *Ibid.* for the Fiscal Year Ended June 30, 1910 at 128–29 (1911); *Ibid.* for the Fiscal Year Ended June 30, 1911 at 146–47 (1912); Combined Statement of the Receipts and Disbursements, Balances, etc., of the United States for the Fiscal Year Ended June 30, 1912 at 105 (1912); *Ibid.* for the Fiscal Year Ended June 30, 1913 at 121 (1913); *Ibid.* for the Fiscal Year Ended June 30, 1914 at 124 (1914); *Ibid.* for the Fiscal Year Ended June 30, 1915 at 142 (1915); *Ibid.* for the Fiscal Year Ended June 30, 1916 at 128 (1916); *Ibid.* for the Fiscal Year Ended June 30, 1917 at 142 (1918); *Ibid.* for the Fiscal Year Ended June 30, 1918 at 142 (1919); *Ibid.* for the Fiscal Year Ended June 30, 1919 at 154 (1920); *Ibid.* for the Fiscal Year Ended June 30, 1920 at 162 (1921); *Ibid.* for the Fiscal Year Ended June 30, 1921 at 173 (1921); *Ibid.* for the Fiscal Year Ended June 30, 1922 at 176 (1923); *Ibid.* for the Fiscal Year Ended June 30, 1923 at 101 (1924); *Ibid.* for the Fiscal Year Ended June 30, 1924 at 103 (1925); *Ibid.* for the Fiscal Year Ended June 30, 1925 at 107 (1926); *Ibid.* for the Fiscal Year Ended June 30, 1926 at 106 (1927); *Ibid.* for the Fiscal Year Ended June 30, 1927 at 157 (1928); *Ibid.* for the Fiscal Year Ended June 30, 1928 at 157 (1929); *Ibid.* for the Fiscal Year Ended June 30, 1929 at 155 (1930); *Ibid.* for the Fiscal Year Ended June 30, 1930 at 332 (1931).

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

App. No. 2-74

THE UNITED STATES OF AMERICA

v.

MESCALERO APACHE TRIBE, ET AL.

App. No. 10-74

THE UNITED STATES OF AMERICA,

v.

THE SHOSHONE-BANNOCK TRIBES OF THE FORT HALL RESERVATION, IDAHO

App. No. 12-74

THE UNITED STATES OF AMERICA,

v.

TE-MOAK BANDS OF WESTERN SHOSHONE INDIANS OF NEVADA, ETC.

Before COWEN, *Chief Judge,* DURFEE, *Senior Judge,* DAVIS, SKELTON, NICHOLS, KUNZIG and BENNETT, *Judges.*

ORDER

This case comes before the court on motion for rehearing, filed August 25, 1975, by the appellee, Mescalero Apache Tribe, and on motion for rehearing, filed August 25, 1975, by the appellees, Shoshone-Bannock Tribes

and Te-Moak Bands of Western Shoshone Indians. Upon consideration thereof, together with the response in opposition thereto, without oral argument,

IT IS ORDERED that the said motions, filed August 25, 1975, for rehearing be and the same are denied.

BY THE COURT
/s/ Wilson Cowen
Chief Judge

[Oct. 3, 1975]

DAVIS, *Judge,* Dissenting:

My usual practice, when I have been in dissent, is not to vote for rehearing (even though I continue to believe the decision of the majority to be wrong) unless there are extraordinary circumstances calling for reconsideration – other than the error (in my view) of the initial decision. Here I find such circumstances in the failure of the court's opinion to deal explicitly and adequately with the appellant's claim under the "fair and honorable dealings" clause (apart from the 1841 statute). I therefore vote to rehear the case on that issue alone.

APPENDIX C

[427] BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 326-A

TE-MOAK BANDS OF WESTERN SHOSHONE INDIANS OF NEVADA, suing on behalf of the Western Shoshone Nation of Indians,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,
Defendant.

Docket No. 22-G

MESCALERO APACHE TRIBE, et al.,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
Defendant.

Decided: October 4, 1973

Appearances:

Pierre J. LaForce, Charles A. Hobbs, and Frances L. Horn, Attorneys for Plaintiff in Docket No. 326-A. Wilkinson, Cragun and Barker were on the Briefs.

Richmond F. Allan and Ruth H. Duhl, Attorneys for Plaintiffs in Docket No. 22-G. Weissbrodt and Weissbrodt were on the Briefs.

Gordon W. Daiger, with whom was Mr. Assistant Attorney General Kent Frizzell, Attorneys for Defendant.

OPINION

Blue, Commissioner, delivered the opinion of the Commission.

[428] ## INTRODUCTORY STATEMENT

The accounting reports filed in these cases show that the defendant has kept substantial amounts of each plaintiff's money in a non-interest-bearing account in the Treasury of the United States during the period between 1883 and 1930. The account is known as Indian Moneys, Proceeds of Labor. We describe it in detail later in this opinion.

The plaintiffs contend that the defendant was required to invest this fund, and its accumulated interest, at the best interest rate attainable or to pay the highest statutory rate for treasury deposits, whichever would provide the greater return, and that it is liable to them for its failure to do so.

We reserved ruling on this contention in our 1970 opinions in these dockets, directing the parties to fully research the pertinent statutes and historical materials. *Te-Moak Bands of Western Shoshone Indians v. United States,* Docket 326, 23 Ind. Cl. Comm. 70, 79 (1970); *Mescalero Apache Tribe,* Docket No. 22-G, 23 Ind. Cl. Comm. 181, 186 (1970).

Pooling their resources, attorneys for the plaintiffs, on June 1, 1971, filed an elaborate brief on the defendant's obligations to make all Indian trust funds productive, accompanying it with two volumes of legal and historical records. The defendant answered on September 13, 1972,

with an equally elaborate brief, accompanied by similarly voluminous records. A short reply was filed by the plaintiffs. Oral argument was held before the Commission
[429] on December 4, 1972. The briefs and argument in Dockets 326 and 22-G have been adopted by reference in nine other accounting cases.[1] The latter cases involve several other unproductive funds in addition to Indian Moneys, Proceeds of Labor.

The Commission is now ready to decide. The extraordinarily thorough work of the lawyers on both sides has greatly helped us to reach our present decision.

The purpose of this opinion is to decide the questions now before us. While we hope the history of the development of Indian trust law herein may prove useful elsewhere, our rulings in the case of each plaintiff who adopted the Te-Moak-Mescalero briefing will be made by separate order, accompanied wherever necessary by a separate opinion.

[430] We start with the proposition that the duties of the United States with respect to the Indian tribes' moneys must be based on written law: the Constitution, treaties, and acts of Congress. We look, of course, to the legal tradition in which the draftsmen of our written law were

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[1]San Carlos Apache Tribe of Arizona, the White Mountain Apache Tribe of the Fort Apache Reservation, *et al.*, Docket 22-H; Northern Paiute Nation, *et al.*, Docket 87-A; Klamath and Modoc Tribes and Yahooskin Band of Snake Indians, Docket 100-B; Fort Peck Indians of the Fort Peck Reservation, Montana, Docket 184; Blackfeet and Gros Ventre Tribes of the Blackfeet Reservation, Gros Ventre and Assiniboine Tribes of the Fort Belknap Reservation, Dockets 279-C and 250-A; Confederated Tribes of the Goshute Reservation, Docket 326-B; Shoshone-Bannock Tribes of the Fort Hall Reservation, Docket 326-C; Three Affiliated Tribes of the Fort Berthold Reservation, Docket 350-G.

trained, the common law and equity jurisprudence, for the implications of their words.[2] But the search for rules governing the administration of Indian trust funds begins as a search of the Statutes at Large.

The ensuing discussion is in chronological order, since Indian trust law developed as a by-product of history rather than according to plan.

I. 1797 TO 1837: THE BEGINNING OF THE INDIAN TRUST FUNDS

The earliest Indian trust fund of the United States appears to be the one set up in 1797 by Robert Morris for the Seneca Nation. In consideration of the Senecas' grant of four million acres in western New York, Morris agreed to invest $100,000 in stock of the Bank of the
[431] United States to be "held in the name of the President of the United States, for the use and behoof of the said nation of Indians." The Government approved Morris's contract with the Senecas and assumed administration of the trust.[3]

In numerous treaties of the late eighteenth and early nineteenth centuries, the United States agreed to pay annuities to the Indians, either perpetually or for a

[2]*Smith v. Alabama*, 124 U.S. 465, 478-479 (1888); *Rice v. Minnesota & Northwestern Railroad Co.*, 60 U.S. (1 Black) 358, 374-375 (1862). *See also United States v. Wong Kim Ark*, 169 U.S. 649, 654 (1898). For the application of equity to the interpretation of the Government's treaty and statutory obligations, *see Seminole Nation v. United States*, 316 U.S. 286, 295-297 (1942); *City of Lincoln v. Ricketts*, 84 F.2d 795, 797 (7th Cir. 1936); Indian Claims Commission Act, §2(1), 25 U.S.C. §70a(1) (1970).

[3]Contract of September 15, 1797, 7 Stat. 601. See also *Seneca Nation v. United States*, 173 Ct. Cl. 917 (1965), *rev'g* Docket 324-A et al., 12 Ind. Cl. Comm. 755 (1963); *subsequent proceedings*, 28 Ind. Cl. Comm. 12 (1972).

term.[4] But these were direct payments out of the treasury in fixed dollar amounts and did not represent interest on any principal fund set aside for the Indians.[5]

Another early Indian trust fund was established by the treaty of February 27, 1819, between the United States
[432] and the Cherokee Nation, 7 Stat. 195. Here, the Government agreed to sell certain ceded lands and invest the proceeds to provide income for the support of education among the Cherokees. A similar educational fund, financed from ceded lands, was established for the Kansas Indians under the Treaty of June 3, 1825, 7 Stat. 244. The Cherokee fund was to be invested, under the direction of the President, in "stock of the United States, or such other stock as he may deem most advantageous to the Cherokee nation."[6] The Kansas treaty does not

[4]A list of the annuities due from the United States to various tribes, with reference to the treaties and statutes authorizing them, appears in the report of the Commissioner of Indian Affairs of November 25, 1852, at 308-313 (item D-80 in the Appendix to the Defendant's Memorandum on the Status of Indian Trust Funds and the Tribes' Rights to Interest on Particular Funds, filed September 13, 1972).

Hereinafter exhibits reproduced in said appendix will be cited as "D-1," "D-2," etc. The plaintiffs designated their compilation of historical exhibits as Appendix B; and items reproduced therein will be cited hereinafter as "B-1," "B-2," etc.

[5]The distinction between trust funds and annuities is well illustrated in the Senate debate of 1831 on a bill to provide for the payment of $6,000 annually to the Seneca Indians in lieu of the actual yield on their $100,000 trust fund, which varied with prevailing interest rates. See 7 *Register of Debates in Congress* 29-30, 78-85 (1831). The bill was approved, and the Seneca trust fund was commuted to an annuity. Act of February 19, 1831, c. 26, 4 Stat. 442.

[6]The word "stock" frequently meant bonds in the nineteenth century, and appears to have been construed exclusively in this sense where used in the treaties and statutes reviewed in this opinion. *Cf. Peoria Tribe v. United States*, 390 U.S. 468, 470 (1968).

even mention investment of the educational fund; but in fact it was invested, in state bonds.[7]

Three treaties made in 1831 appear to be the earliest in which the United States agreed to pay interest itself on the proceeds of ceded Indian lands, rather than to invest them.[8] Five percent was the stipulated rate. This appears to be the first mention in an Indian treaty of 5 percent, which later became the prevailing interest rate on Indian trust funds.

[433] Despite the treaty language requiring the United States itself to pay the interest on the 1831 funds, Congress decided that these funds should be invested. The fourth section of the Act of June 14, 1836, c. 88, 5 Stat. 36, 47, directed the Secretary of War to invest "in a manner which shall be, in his judgment, most safe and beneficial for the fund," with a proviso that he should make no investment at a lower rate than five percent.

Investment meant actually buying bonds, usually through a stockbroker, storing the certificates in an iron safe in the office of the Commissioner of Indian Affairs, and clipping and presenting the coupons for payment when interest became due.[9] Depositing the funds in the

[7]S. Doc. 426, 25th Cong., 2d Sess. 6 (1838—D-17).

[8]Treaties of February 28, 1831, with Senecas of Sandusky, 7 Stat. 348; of July 30, 1831, with Senecas and Shawnees residing at and around Lewistown, 7 Stat. 351; and of August 8, 1831, with Shawnees residing at Wapaghkonnetta and Hog Creek, 7 Stat. 355.

[9]*See* Select Committee to Inquire into And Report the Facts in Relation to the Fraudulent Abstraction of Certain Bonds, Held by the Government in Trust for the Indian Tribes, from the Department of the Interior, Abstracted Indian Trust Bonds, H.R. Rep. No. 78, 36th Cong., 2d Sess. (Serial 1107, 1861), especially testimony of Secretary of the Interior Jacob Thompson at 27-45, former Commissioner of Indian Affairs Luke Lea at 46, and Mr. J. A. Williamson at 237. *See also* "General Remarks" at pages 6-7 of S. Doc. 426, 25th Cong., 2d Sess. (1838—D-17).

U.S. Treasury, with the Government paying interest on them, was not considered investment, but as something done in lieu of investment.[10]

[434] It is therefore inaccurate to state that the Act of June 14, 1836, or similar legislation, required the Government to "pay" interest to the Indians. The Government as trustee was required to buy securities bearing 5 percent or higher interest; but the issuers of the securities were to provide the interest.

The 1836 legislation was doubtless influenced by the contemporary happy position of the treasury. The public debt had been extinguished in 1835, except for $328,582.10 which remained outstanding solely because the creditors had not come forward to receive payment. A surplus of at least $14,000,000 was anticipated in the treasury at the end of 1836. By the Act of June 23, 1836, c. 115, sec. 13, 5 Stat. 55, Congress provided that any such surplus over $5,000,000 should be distributed to the States of the Union. The estimate proved low, and $28,101,644.94 were actually distributed. *See* R. Bayley, *The National Loans of the United States,* 67 (2d ed., 1882) (D-5).

Under such circumstances it would have made little sense for the United States to pay interest to the Indians in order to keep funds it did not need.

[10]*See* Reports of Commissioner of Indian Affairs, for 1840 at 278 (D-41), for 1842 at 396 (D-48), for 1852 at 306 (D-80), for 1874 at 465 (D-83), for 1875 at 151 (D-84), for 1876 at 263 (D-85), for 1879 at 310 (D-86), for 1905 at 483-84 (D-87), for 1906 at 448-49 (D-90), and for 1909 at 150 (D-91).

II. 1837 TO 1841: THE DEBACLE OF THE STATE BONDS

By the fourth section of the Act of January 9, 1837, c. 1, 5 Stat. 135, Congress extended the investment
[435] provisions of the Act of June 14, 1836, so as to apply to "all moneys that may hereafter be received under the treaties therein named, or under any others containing similar stipulations for the payment to the Indians annually, of interest upon the proceeds of the lands ceded by them."

The 1837 act was entitled, "An Act to regulate, in certain cases, the disposition of the proceeds of lands ceded by Indian tribes to the United States." It applied only to trust funds established from the proceeds of sales of ceded lands.

The first section provided that the net proceeds of such sales should be paid into the U.S. Treasury in the same manner as moneys received from sales of public lands. The second section was a permanent appropriation authorizing the withdrawal of such Indian moneys in conformity with treaties requiring their payment or investment. The third section read as follows:

> *And be it further enacted,* That all investments of stock, that are or may be required by said treaties, shall be made under the direction of the President; and special accounts of the funds under said treaties shall be kept at the Treasury, and statements thereof be annually laid before Congress.

By 1838 there were some 13 Indian trust funds in the custody of the Secretary of War (as head of the department where the Bureau of Indian Affairs was then located) and one in the custody of the Secretary of the Treasury. They arose under various provisions of ten or more but offered to continue paying interest in coin.

[436] more treaties. All were invested in state bonds, which had a total face value of $3,674,462.79.[11]

State bonds were probably chosen as investments for the Indian trust funds because Federal bonds were unavailable (the national debt having been extinguished in 1835) and private securities were deemed inappropriate.[12]

As it turned out, January 9, 1837, was a highly inopportune time to establish a policy of investing the Indian trust funds in preference to depositing them in the Federal treasury and paying out interest. A financial crash occurred within a matter of weeks, and in May most banks were forced to suspend specie payments. State bonds were severely affected. Tennessee paid interest only in the form of an unwithdrawable credit to the Treasurer of the United States on the books of the Union Bank at Nashville. Alabama and Mississippi defaulted outright on the interest payments. Maryland was unable to redeem its matured bonds, but offered to continue

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[11] Figures for the cost of the bonds given in Senate Document 426 (D-17) add up to $3,849,441.70; but H.R. Rept. 892, 25 Cong., 2d Sess. (1838) (*see* D-18), states the cost was $3,851,056.21.

[12] R. Bayley, *The National Loans of the United States* 67 (1882) (*see* D-5). In 1835 and 1836, before making the initial investment of the largest Indian trust fund of the period, the Chickasaw fund, Secretary of the Treasury Levi Woodbury did consider bank stock, but rejected this form of investment in favor of state stock. See contemporary correspondence in defendant's exhibits D-9 and D-43. The Secretary may have been influenced by contemporary English law, which prohibited trustees from investing in stock of any private company, without express authorization in the trust instrument. The only "legal" investments were Government and Bank of England Annuities. T. Lewin, A Practical Treatise on the Law of Trusts and Trustees, 308, 311 (1837); J. Willis, Duties and Responsibilities of Trustees, 126 (1827); *see also* G. Bogert, Trusts and Trustees, §613 (2d ed., 1960).

[437] paying interest in coin. Finally it defaulted on interest too.[13]

By the fall of 1837, the United States itself had to go back in debt, borrowing $10,000,000 on treasury notes. *See* Act of October 12, 1837, c. 2, 5 Stat. 201; and D-5, p. 67.

Until 1833 the United States appears to have created trust funds only when it got the money from purchasers of Indian lands. Where it did not get the money from third parties, but wished to secure the Indians a permanent income, the Government used annuities.

This policy was changed during the Jacksonian prosperity. An educational trust fund of $70,000 was set up by direct disbursement from the Federal Treasury under Article 3d of theChippewa, Ottowa and Potawatamie treaty of September 26, 1833, 7 Stat. 432. Trust funds were also established by direct disbursement from the treasury for the Cherokees under the Treaty of December 29, 1835, 7 Stat. 478; for the Menominies under the Treaty of September 3, 1836 (by Senate amendment), 7 Stat. 509, and for the Ottawas and Chippewas under the Supplemental Article to the Treaty of March 28, 1836, 7 Stat. 496.

During the ensuing depression, the Government did not quit promising to set up Indian trust funds by direct disbursement of its own money, but it quit making the disbursements. The Commissioner of Indian Affairs reported on November 28, 1840, that Congress was annually appropriating $131,005 interest in lieu of

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[13]See contemporary correspondence to and from the Secretary of the Treasury in exhibits D-13 and D-14, and S. Doc. 52, 27th Cong., 1st Sess. (1841–D-32).

[438] investing nine trust funds totaling $2,580,100.[14] These
[439] were in addition to the invested trust funds. which in

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[14]These funds are listed as follows on page 278 of the Commissioner's Report (D-41). We have corrected a number of erroneous citations in the original.

Names of Tribes	*Principal*	*Interest*	*Authority of Trust*
Ottawa and Chippewa	$ 200,000	12,000	Senate amendment to Treaty of March 28, 1836, 7 Stat 497.
Osage	69,120	3,456	Treaty June 2, 1825, 7 Stat. 242, as modified by Sen. Res. Jan. 19, 1838, Sen. Jour. 25th Cong., 2d Sess., 155.
Delaware	46,080	2,304	Supplementary Article Sept. 24, 1829, 7 Stat. 327, as modified by Sen. Res. of Jan. 19, 1838, *supra.*
Sioux of the Mississippi	300,000	15,000	Treaty Sept. 29, 1837, 7 Stat. 538.
Sac and Fox of the Mississippi	200,000	10,000	Treaty Oct. 21, 1837, 7 Stat. 540
Sac and Fox of the Missouri	157,400	7,870	Treaty Oct. 21, 1837, 7 Stat. 543.
Winnebago	1,100,000	55,000	Treaty Nov. 1, 1837, 7 Stat. 544.
Creek	350,000	17,500	Treaty Nov. 23, 1838, 7 Stat. 574.
Iowa	157,500	7,875	Treaty Oct. 19, 1838, 7 Stat. 568
	$2,580,000	$131,005	

1840 had a face value of $3,998,462.73.[15] Since the uninvested trust funds were all to be established by direct payment from the treasury rather than from the proceeds of land sales, the Act of January 9, 1837, was inapplicable. But in all cases except the Ottawa and Chippewa fund, the treaty or Senate resolution creating the trust required it to be invested rather than deposited at interest.

The Annual Report of the Commissioner of Indian Affairs for 1879 (D-86), at 310, shows four of the nine funds (Osage, Winnebago, and both Sac and Fox) as still uninvested. It also shows 24 subsequently established funds as uninvested, with Congress appropriating the annual interest. Most of the treaties and statutes creating the latter funds expressly authorized their deposit in the treasury at interest. In the earlier cases, however, this alternative to investment appears to have been authorized only by the annual appropriation acts which provided the interest.

The depression which started in 1837 was still going on in 1841. *See* Message from the President of the United
[440] States, H.R. Ex. Doc. 1, 27th Cong., 1st Sess. (1841–D-12). Some of the state bonds remained in default two years later (D-14), and one state was still in default 35 years later. *See* Annual Report of the Commissioner of Indian Affairs for 1876 (D-85, p. 275).

[15]Invested trusts administered by Secretary of War (D-41, p. 276):	$1,897,321.76
Chickasaw fund, administered by Secretary of the Treasury (H.R. Doc. 145, 26th Cong., 1st Sess., 3 (1840) (D-19):	2,101,141.03
Total invested Indian trust funds in 1840:	$3,998,462.79

III. 1841 to 1880: INDIAN TRUST FUNDS REQUIRED TO BE INVESTED IN FEDERAL BONDS ONLY.

Against such a background Congress enacted the Act of September 11, 1841, requiring all "funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty [to] . . . be invested in stocks of the United States bearing a . . . rate of interest not less than five per centum per annum."

The following is the complete text of the act, which appears at 5 Stat. 465:

> CHAP. XXV.—*An Act to repeal a part of the sixth section of the act, entitled "An act to provide for the support of the Military Academy of the United States for the year eighteen hundred and thirty-eight, and for other purposes," passed July seventh, eighteen hundred and thirty-eight.*
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That so much of the sixth section of an act entitled, "An act to provide for the support of the Military Academy of the United States for the year eighteen hundred and thirty-eight, and for other purposes," as requires the Secretary of the Treasury to invest the annual interest accruing on the investment of the money arising from the bequest of the late James Smithson, of London, in the stocks of States, be, and the same is hereby, repealed. And the Secretary of the Treasury shall, until Congress shall appropriate said accruing interest to the purposes prescribed by the testator for the increase and diffusion of knowledge among men, invest said accruing interest in any stock of the United States bearing a rate of interest not less than five per centum per annum.

[441] Sec. 2. *And be it further enacted,* That all other funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall in like manner be invested in stocks of the United States, bearing a like rate of interest.

Sec. 3. *And be it further enacted,* That the three clerks, authorized by the act of June twenty-third, eighteen hundred and thirty-six, "to regulate the deposits of the public money," be, and hereby are, directed to be retained and employed in the Treasury Department, as provided in said act, until the state of the public business becomes such that their service can conveniently be dispensed with.

This act clearly superseded the third and fourth sections of the 1837 act, and the fourth section of the 1836 act, discussed above, which had given the President and Secretary of War discretion to invest the Indian trust funds in any kind of securities deemed safe and beneficial, so long as they bore at least 5 percent interest. It did not, however, change the general policy of these earlier acts, that the trust funds were to be invested, by purchasing certificates of outstanding issues, rather than deposited at interest in the U.S. Treasury as in a savings bank.. Now, however, only Federal bonds could be purchased as trust investments.

A. *The 1841 act is a direction to invest trust funds as well as a limitation on the kind of securities in which investment may be made.*

The defendant contends the 1841 act created no duty to invest. It was a housekeeping statute, the defendant states, dealing only with the kind of securities in which trust investments were to be made; the duty to invest, where it existed, was imposed by treaty or some other law.

The plain language of the 1841 act, in our opinion, is enough to refute this contention. Congress knew how to
[442] phrase a statute so as to make it applicable to funds required to be invested by treaty. Thus, it wrote in section 3 of the 1837 act, 5 Stat. 135, ". . . all investments of stock that are or may be required by said treaties shall be made under the direction of the President . . ." If it had intended the meaning claimed for the 1841 act by the defendant, it could have written:

> Sec. 2. . . all other funds held in trust by the United States, and the annual interest accruing thereon, *where investment is required by treaty*, shall in like manner be invested in stocks of the United States, bearing a like rate of interest.

Congress did not use the underlined phrase. Instead, it used the phrase, "*when not otherwise required by treaty*". The natural meaning of the words actually used is almost diametrically opposed to the defendant's present interpretation.

By 1841, the duty of private trustees to make the beneficiaries' funds productive as well established in contemporary law.[16] It appears entirely probable that Congress would extend the rule of productivity to the public trust funds, if such rule did not already apply to them. This is what the words actually used in the act of September 11 imply. It appears in the same degree improbable that Congress, using the words it did, could intend to perpetuate the anomaly of indefinitely idle public trust funds, if such previously existed.

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[16] 2 J. Kent, Commentaries on American Law *230-232 (3d ed., 1836); T. Lewin, A Practical Treatise on the Law of Trusts and Trustees 305 (1st ed., 1837); J. Willis, Practical Treatise on the Duties and Responsibilities of Trustees 181 (1827).

[443] The defendant's position that the 1841 act applies only to trust funds required to be invested by some other law becomes even less tenable when one examines the Indian trust funds existing in that year which actually were invested. The defendant admits that these were within the purview of the act; yet a number of them were not, in fact, required to be invested by any prior law.

The invested Indian trust funds in existence in 1841 consisted of:[17]

(1) The Chickasaw National Fund, established under Article XI of the treaty of October 20, 1832, 7 Stat. 385, and Article XI of the Treaty of May 24, 1834, 7 Stat. 454. This trust fund was administered by the Secretary of the Treasury, by delegation of the President. *See* Presidential Message of December 23, 1835, and Senate Resolution of January 20, 1836, in Exhibits D-9 and D-43; *cf.* act of April 20, 1836, c. 53, 5 Stat. 10.

(2) The following funds administered by the Department of War, in which the Bureau of Indian Affairs was then located:

[444]

	Beneficiary	*Authority for Establishment of Trust*
1.	Cherokee Schools	Art. 4, Treaty Feb. 27, 1819, 7 Stat. 197
2.	Cherokee Tribe	Art. 10, Treaty Dec. 29, 1835, 7 Stat. 483
3.	Chickasaw Incompetents	Art. IV, Treaty May 24, 1834, 7 Stat 451
4.	Chickasaw Orphans	Art. VIII, Treaty May 24, 1834, 7 Stat. 453
5.	Chippewa, Ottawa, and Potawatomie, Education	Art. 3d, Treaty Sep. 26, 1833, 7 Stat. 432
6.	Chippewa, Ottawa, and Potawatomie, Mills, etc.	Administrative action
7.	Choctaw Orphans	Art. XIX, Fifth, Treaty Sep. 27, 1830, 7 Stat. 337
8.	Choctaw Tribe	Art. III, Convention between Choctaw and Chickasaw Tribes, Jan. 17, 1837, 11 Stat. 574
9.	Creek Orphans	Art. 2, Treaty March 24, 1832, 7 Stat. 366
10.	Delaware Tribe	Supplementary Treaty, Sep. 24, 1829, 7 Stat. 327, as modified by Senate Res. Jan. 19, 1838, Sen. Journal, 25th Cong., 2d Sess. 155 (1838)
11.	Kansas Schools	Art. 5, Treaty June 3, 1825, 7 Stat. 245
12.	Menominie Tribe	Senate amendment to Treaty Sep. 3, 1836, 7 Stat. 509

[17] *See* Commissioner of Indian Affairs' Report of November 16, 1842 (D-48); Report from the Secretary of the Treasury, September 8, 1841, S. Doc. 116, 27th Cong., 1st Sess. (D-20); Commissioner of Indian Affairs' Report of November 28, 1840 (D-41); and Secretary of the Treasury's Report of March 17, 1840, H.R. Doc. 145, 26th Cong., 1st Sess. (D-[illegible]9). The funds listed on this and the following page are in addition to the funds on deposit in the treasury at interest, listed above in footnote 14.

Beneficiary	Authority for Establishment of Trust
13. Osage Tribe	Art. 6, Treaty June 2, 1825, 7 Stat. 242, as modified by Sen. Res. Jan. 19, 1838, *supra*
14. Ottawa and Chippewa Nations	Articles Fourth and Fifth, Treaty March 28, 1836, 7 Stat. 492
15. Senecas of Sandusky	Art. 8, Treaty Feb. 28, 1831, 7 Stat. 350, as modified by Act June 14, 1836, c. 88, 5 Stat. 47
[445] 16. Senecas and Shawnees of Lewistown	Art. VIII, Treaty July 20, 1831, 7 Stat. 353, as modified by Act June 14, 1836, *supra*
17. Shawnees of Wapaghkonetta and Hog Creek	Art. VII, Treaty Aug. 8, 1831, 7 Stat. 357, as modified by Act June 14, 1836, *supra*
18. Stockbridge and Munsee Schools	Art. 4, Treaty Sep. 3, 1839, 7 Stat. 581

Investment provisions are wholly lacking in the treaties numbered 10, 11, and 13 in the above list.

The Menominie trust fund (No. 12 in above list) was created by a Senate amendment, the original treaty providing for neither a trust nor a fund.

The Choctaw fund (No. 8 above) was established by a treaty between two Indian tribes, to which the United States was not a party, although the President and the

Senate gave their approval. The intertribal treaty provided for a sale by the Choctaws of an interest in their land to the Chickasaws, in return for the latters' setting over to them a portion of the Chickasaw trust fund.

The Chippewa, Ottawa, and Potawatomie United Nation "mill fund" (No. 6 above) was created by administrative action. The circumstances of its creation are revealed thus in the Commissioner of Indian Affairs' report of November 28, 1840 (D-41, at page 279):

[446] *Beneficial objects for Chippewas, Ottawas, and Pottawatomies.*

> By the 3d article of the treaty of 26th September, 1833, the United States contracted to apply $150,000 "to the creation of mills, farm houses, Indian houses, and blacksmiths' shops; to agricultural improvements, to the purchase of agricultural implements and stock, and for the support of such physicians, millers, farmers, blacksmiths, and other mechanics, as the President of the United States shall think proper to appoint." The above sum was applied, on the 1st January, 1837, to the purchase of $130,850.43 of Maryland six per cent. stock, which has yielded, up to 1st July last, of interest, $19,627.52, and cost $150,000.
>
> There is no direct authority in the treaty for investing the above money; but it appears that a letter was, on the 14th December, 1836, addressed by my predecessor to the Secretary of War *ad interim*, proposing to invest the said sum in some safe and productive stock. This letter was subsequently withdrawn, and for it appears to have been substituted, on 1st January, 1837, a general authority from the Secretary to the then Commissioner of Indian Affairs to direct investments, &c.; under which, it is believed the above investment was made.

> The sum was very large for the purposes pointed out in the treaty; and the investment was judicious, in my opinion, as furnishing a permanent fund, the annual yield of which will be probably equal to all the Indian wants. The interest, however, ought to be reinvested until its expenditure is deemed advisable, so as to enlarge the fund.

The Commissioner of Indian Affairs points out in the same report the dubious legal basis for holding in trust the funds appropriated under the fifth article of the Ottawa and Chippewa treaty of March 28, 1836 (No. 14 in the above list). This article provided for setting $300,000 aside for payment of the Indians' debts. As originally written, it stated that if the debts did not amount to that sum, the balance was to be "paid over to the Indians, in the same manner, that annuities are required by law to be paid". A supplemental article,
[447] signed March 31, 1836, provided that the balance was to be retained "and vested by the Government in stock". *See* 7 Stat. 497.

In ratifying the treaty, however, the Senate further amended the fifth article to provide that the balance was "to apply to such other use as they [the Indians] may think proper". Sen. Res., May 16, 1836, 4 Sen. Ex. Jour. 542.

In his 1840 report, cited above, the Commissioner stated that he found no request by the Ottawas and Chippewas for the application of the balance of their debt fund, but that $75,460 of it had nevertheless been invested in Kentucky bonds. The Commissioner continued (at page 281):

> It will thus be seen that there was no direct authority for the investment in Kentucky stock; but yet I cannot but regard the course adopted as the most judicious and beneficial for the Indians, who should be paid the interest punctually and annually, which has not been done heretofore.

The Commissioner of Indian Affairs' Report was appended to the President's Message to the Two Houses of Congress at the Commencement of the Second Session of the 26th Congress and published in House Executive Document No. 2, 26th Congress, 2d Session. Thus Congress was not only aware of the lack of express requirements for investment in several of the treaties under which trust funds had been established, but also knew that two of them had been established extralegally. There is no evidence that Congress disapproved of what had been done. On the contrary, the plain language of the 1841 act, which states, "all funds held in trust by the United States . . . shall . . . be invested . . . ," implies an intent to legalize and adopt the Indian Commissioner's actions.

[448] In support of its position that the 1841 act applied only to funds elsewhere required to be invested, the defendant points out, however, that the Government had certain trust funds which were not invested before 1841 and remained uninvested thereafter.

Expenditures only from several funds alleged to fall in this category are shown in H. R. Ex. Doc. 31, 27th Cong., 1st Sess. (July 9, 1841–D-39). They bear such captions as "Awards under convention with the King of the Two Sicilies," "Awards under the first article of the treaty of Ghent," and "Payment of demands for unclaimed merchandize". Most of these appear to have been passive trusts, where the Government's only duty was to pay over the beneficiaries as soon as they came forward and identified themselves. Such funds being subject to immediate withdrawal, investment may often have been infeasible.

None of these funds appears to have been invested, or borne interest, before 1841. It seems, however, that the State Department trust funds, like the two award funds named above, were invested after 1841. *See* "Trust Funds, State Department," H. R. Ex. Doc. 362, 49th Cong., 1st Sess. (1886–D-95); *United States* ex rel. *Angarica v. Bayard,* 127 U. S. 251 (1888); *cf. Henkels v. Sutherland,* 271 U. S. 298 (1926); *Great Western Insurance Co. v. United States,* 19 Ct. Cl. 206, *aff'd* 112 U. S. 193 (1884). The history of the trust funds which were unproductive in 1841 thus gives poor support to the defendant's interpretation of the act of that year.

[449] Many cases of idle trust money in the Government's custody can probably be explained on the practical ground that ready cash was needed for early disbursement, or that there had not been sufficient time to invest incoming funds. Congress knew cash must be available in the trust accounts a reasonable time in advance of anticipated expenses and distributions, and that it took time to collect and invest trust moneys from the field, such as the proceeds of sales of Indian land. *See, e.g.,* remarks of Senator Wright concerning the Chickasaw fund at 9 Cong. Globe 32 (Dec. 17, 1840).

Private trust law in 1841, and today, allows the trustee to hold cash a reasonable time before investment and prior to disbursement. J. Willis, *Duties and Responsibilities of Trustees,* 181 (1827); *cf. Barney v. Saunders,* 58 U. S. (16 How.) 535 (1853); in re *Thorp,* 23 F. Cas. 1153 (No. 14,002, D.C.D. Me. 1846); and compare G. Bogert, *Trusts and Trustees,* §§611, 702 note 36 (2d ed., 1960). Clearly, Congress did not intend every last penny of the Government's trust funds to be invested every moment; but it did intend all such funds to be invested if they were on hand long enough to make investment practicable. *Cf. Menominee Tribe v. United States,* 107 Ct. Cl. 23 (1946).

B. Legislative history of 1841 act–Part 1: Section 2 had its source in Senate Amendment.

The legislative history of the Act of September 11, 1841, in the first session of the 27th Congress serves only to confirm the statute's plain language.

[450] On September 1, 1841, Congressman John Quincy Adams asked the House of Representatives to act upon a series of resolutions condemning the investment of Federal funds–the Government's own and those it held in trust–in state securities. The following one of them was passed:

> *Resolved,* That the further investment of any public funds of the United States in stocks of the several States ought forthwith to be prohibited by law; and that the Committee of Ways and Means be instructed to report a bill for that purpose.[18]

The former President was particularly concerned with the safety of the James Smithson bequest, which, by a rider on the Military Academy Appropriation Act of 1838,[19] had been ordered invested, together with its accruing interest, in state stocks. He had just managed to secure payment of some of the defaulted state bonds in the Government's trust portfolios by getting an amendment into the act which granted Federal public land revenues to the states. The Adams amendment required each state's share to be first applied on its debt to the United States.[20] Mr. Adams feared also that investment

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[18]Cong. Globe September 1, 1841, 419 (B-3).

[19]Sec. 6, Act of July 7, 1838, c. 169, 5 Stat. 267.

[20]Sec. 4, Act of September 4, 1841, c. 16, 5 Stat. 454.

of Federal money in state stocks would lead to favoritism by Federal officials as between states. *See* H. R. Ex. Doc. No. 11, 25th Cong., 3d Sess. (1838) (D-29).

On September 2, 1841, Millard Fillmore, the Chairman of the Ways and Means Committee, responded to Mr. Adams' resolution by reporting out H. R. 34. It was read twice, as follows (D-34):

[451] An act to repeal the 6th section of the act entitled "An act to provide for the support of the Military Academy of the United States, for the year 1838, and for other purposes," passed July 7th, 1838." and to prohibit the investment of funds of the United States in stocks of the several States.

Be it enacted by the Senate and House of Representatives of the United States of America in congress assembled: That so much of the Sixth Section of the act entitled *"An Act to provide for the support of the Military Academy of the United States for the year 1838 and for other purposes"* passed July 7, 1838, as is inconsistent with this act, be and the same is hereby repealed; and the further investment of any public or trust funds of the United States in stocks of the several States is hereby prohibited. [Emphasis as in original hand-written bill]

H. R. 34 was immediately put on a third reading, read, and passed without debate. 10 Cong. 421 (Sep. 2, 1841) (B-3).

At this point, the bill meant approximately what the defendant contends the Act of September 11, 1841, means. It forbade investments of Federal funds in state securities,and no more.

The next day the House-passed bill was read twice in the Senate. Senator Sevier said "that this bill was one of a

most extraordinary character. It was to repeal existing contracts, and to violate treaty stipulations with the Indians. . . " Senator Woodbury (the former Secretary of the Treasury, under whose direction state bonds had been purchased for the Chickasaw trust fund) answered "that the bill could only prospective in its character, and would have no effect on existing contracts".[21]

[452] Mr. Sevier moved to refer the bill to the Committee on Indian Affairs; but his motion lost, and H. R. 34 was referred to the Committee on Finance. 10 Cong. Globe 422 (Sep. 3, 1841). The choise of committees is significant, for it placed the bill under study by men whose concern was primarily with the public finances rather than Indian matters. One of the results was a uniform legislative treatment of the Smithsonian trust, the Indian trusts, and the other trust funds of the Government, which appears not to have occurred previously or ever to have been repeated.

The Finance Committee struck out all after the enacting clause, and on September 8 reported H. R. 34 out in the following form (D-37):

That so much of the sixth section of an act entitled "an act to provide for the support of the Military Academy of the United States for the year 1838 & for other purposes" as requires the Secretary of the Treasury to invest the annual interest accruing on the investment of the money arising from the bequest of the late James Smithson of London, in the stocks of States, be & the same is hereby repealed; & the Secretary of the Treasury shall invest said accruing interest in any stock of the

[21] Sevier had sold $35,000 of Arkansas state bonds to Woodbury for the Chickasaw fund in 1838. H.R. Doc. 65, 27th Congress, 3d Session (1843) (Ser. 420).

United States bearing a rate of interest not less than five per centum per annum.

Sec. 2. Be it further enacted, that all other ~~trust~~ funds [interlined] held in trust by the United States [end interlineation] and the annual interest accruing thereon, when not otherwise required by treaty shall in like manner be invested in stocks of the United States, bearing a like rate of interest—

The second section of the Act of September 11, 1841, thus derives from the Senate Finance Committee amendment, not from the original bill.

[453] C. Analysis of language of Section 2 of 1841 act.

1. ". . . .all other funds held in trust by the United States. . . ."

Whatever else the phrase in the Senate amendment "all other funds held in trust by the United States" extended to, there can be no reasonable doubt that it included the Indian trust funds. Indeed, the Senate's attention was particularly focused on these funds during its consideration of H. R. 34.

The Secretary of the Senate wrote to the Secretary of the Treasury on September 8, 1841—the same date the Finance Committee reported out H. R. 34 in amended form—requesting "for use in the Senate today a copy of the report of the Secretary of the Treasury dated 23 December, 1835, in relation to the Chickasaw funds or stock to be purchased for the same. . . " (D-42). The Secretary of the Treasury complied before the day was over, sending a copy of President Jackson's 1835 message to the Senate proposing an investment program for the then newly-established Chickasaw fund. (D-43, D-44).

The Secretary of the Treasury chose the same day, September 3, 1841, to respond to a resolution passed a month upon motion of Senator Sevier. This reolution instructed the Secretary to inform the Senate "what amount of Indian money, legacies, or trust funds have been invested in State stocks; and in the stocks of which
[454] States, and the amount of any such investments in each State where the investments have been made." *See* Senate Journal, 27th Cong., 1st Sess., 136.

Mr. Sevier explained that "he had called for this information in consequence of a section in the land bill, in which States were held up as indebted, and among them his own State [Arkansas], and he desired the facts in the case." 10 Cong. Globe 292 (Aug. 4, 1841). The "land bill" was the revenue-sharing measure then pending before Senate which became the Act of September 4, 1841 *(supra,* note 20). The section having to do with states' indebtedness was the Adams amendment, mentioned above, adopted in the House on July 6, 1841 (10 Cong. Glove 155).

The Secretary's report in response to the Sevier resolution covered all the invested trust funds of the United States then in existence, illustrating what the defendant concedes to have been meant by the phrase in the 1841 act "funds held in trust by the United States." *See* S. Doc. 116, 27th Cong., 1st Sess. (Serial 390, D-20).

The state stock held by the United States is described in three tables. The first is entitled, "Description of stock held by the United States in trust for the Chickasaw Indians." The second is entitled, "State stocks held by the Treasury Department in trust for the Smithsonian Institution." No distinction between the trust status of the two funds is indicated, although the act creating the Smithsonian fund expressly states that it shall be held "in

[455] trust," while the word "trust" does not appear in the treaties creating the Chickasaw fund. Compare §6, act of July 7, 1838, c. 169, 5 Stat. 276, with Act XI, Treaty of October 20, 1832, 7 Stat. 385, and Art. XI, Treaty of May 24, 1834, 7 Stat. 454.

The third table in the Secretary of the Treasury's report of September 8, 1841, covers the Indian trust funds administered by the War Department. It is entitled, "Statement showing the States in whose stocks investments have been made out of Indian trust funds, the amount invested in each State's stock and the par value of each." The funds referred to in this table are not identified by tribes, but can be identified by cross-reference to the Secretary of the Treasury's Report of March 17, 1840 (H.R. Doc. 145, 26th Cong., 1st Sess.) (D-19), and the Commissioner of Indian Affairs' Report of November 28, 1840 (D-41), and brought down to date by reference to the Commissioner of Indian Affairs' Report of November 16, 1842 (D-48). These funds are listed above on pages 444-445 of this opinion.

The word "trust" occurs in only one of the treaties or resolutions establishing the above-listed funds. *See* Art. 1, Cherokee Treaty of 1819, No. 1 in the list on page 444, *supra.*

The words of art traditionally used to create private trust funds, "for the use and general benefit of," appear in only three treaties (Nos. 15, 16, and 17 above). These three, interestingly enough, are the only ones in the list where the trust provisions were amended unilaterally by Congress, something which would have been impossible
[456] with the kind of "technical" trust fund the Chippewas unsuccessfully contended for in *Chippewa Indians v. United States,* 307 U. S. 1 (1939).

Most of the treaties establishing Indian trust funds contained no "magic" words at all indicating trust status. This was entirely consistent with private trust laws, which in 1841 as today required no particular formula or ceremony to create an express trust. *See* J. Story, *Equity Jurisprudence* §980 (1836), quoted below at page 500; *Restatement (Second) of Trusts* §24 (1959).

As noted above, one of the funds was created by a treaty between two Indian tribes, and two were established by administrative action without express authority of law.

Despite the disparate formalities by which they were created, neither the administration nor the Congress discriminated among the above-listed Indian trust funds.

Thus, the Commissioner of Indian Affairs termed his report of May 3, 1838, listing all of these same funds which were already in existence on that date, "a full statement of all moneys under the control of the Government, held *in trust* for the Indians." S. Doc. 426, 25th Cong., 2d Sess. 2 (1838–D-17–emphasis in original).

The House Indian Affairs Committee referred to the same funds, plus the Treasury-administered Chickasaw fund, without distinction, as "trust funds" on May 15, 1838. H. R. Rept. 892, 25th Cong., 2d Sess. (1838–D-18).

In response to a resolution of the House of Representatives directing him to furnish a statement of "all the
[457] public moneys of the United States invested in the stocks of the several States", the Secretary of the Treasury reported as follows on March 17, 1840 (H. R. Ex. Doc. 145, 26th Cong., 1st Sess. (1840) (D-19)).

. . . I have the honor to state that this department is not aware that any "of the *public moneys* of the *United States,*" held in their own right, are "invested in the stocks of the several States." But some of the moneys held in trust by the United States have been invested in such stocks, either by agreement with those possessing the legal title, such as treaty stipulations with Indian tribes; or by authority of acts of Congress, such as that of the 7th of July, 1838, concerning the moneys received on account of the Smithsonian bequest. [Emphasis in original.]

There followed a list of all the same funds set out on pages 444-445 of this opinion, except the Choctaw, Delaware, Osage, and Stockbridge and Munsee funds, which appear not yet to have been set up.

The defendant concedes, at page 53 of its brief, that the funds listed in H. R. Ex. Doc. 145 (D-19), as well as the uninvested funds named in H. R. Ex. Doc. 31, 27th Cong., 1st Sess. (D-39), discussed in a previous section of this opinion, are comprehended in the term "funds held in trust by the United States".

Clearly, the phrase "funds held in trust by the United States" was in common usage in the government parlance of 1841. The term was broadly inclusive, and extended at least to all Indian funds held by the Government at the Washington level. It could have had no narrower meaning when used by Congress without limiting language in the act of September 11 of that year.

[458] *2. ". . . and the annual interest accuring thereon. . ."*

The provision in section 2 for investing interest exemplifies the uniformity of treatment by the Finance Committee of the Smithsonian and Indian trust funds.

Investment of the Smithsonian interest had been required by section 6 of the act of July 7, 1838, c. 169, 5 Stat. 267, which was adopted actually before Smithson's bequest arrived from England, in eleven boxes of gold sovereigns.[22] Section 1 of the 1841 act requiring the Smithsonian interest to be invested in Federal bonds replaced the earlier law's requirement for investment in state bonds.

Adhering to its position that the 1841 act created no new duty to invest, the defendant contends the phrase "and the annual interest accruing thereon" applies only to the income from trust funds which some other law required to be reinvested. There was only one such fund in 1841, the Menominie fund, created by Senate amendment to the treaty of September 3, 1836, 7 Stat. 509.

The defendant, in short, would have us hold that section 2 of the 1841 act is not self-executing.

Section 1 of the act, however, clearly is self-executing. That section did not amend but repealed provisions of the act of July 7, 1838, relating to the investment of
[459] interest accruing on the Smithsonian fund. After September 11, 1841, the only remaining law which required investment of the Smithsonian interest was section 1 of the act of that date.

Section 2 of the 1841 act states that the annual interest accruing on all other trust funds of the United

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[22] 1 *W. Rhees, The Smithsonian Institution, Documents Relative to its Origin and History* 100, 101 (1901) [hereinafter cited as *Rhees*].

The driblets of interest on the Smithsonian investments which came in after September 11, 1841, were, in fact, reinvested by the Secretary of the Treasury in U.S. Government bonds. *Rhees* 243-244.

States shall be invested in Government bonds "in like manner" to the Smithsonian interest. The words used give no justification for construing section 2 as any less mandatory and self-executing than section 1.

If Congress had meant for Indian trust fund interest to be reinvested only when a treaty or other law so required, there would have been no need to use the phrase "and the annual interest accruing thereon" in section 2. Interest retained for reinvestment under a treaty so requiring was as much a "fund held in trust by the United States" as the original principal. Section 2 minus the phrase "and the annual interest accruing thereon" would have required such retained interest to be invested. The presence of the phrase in the section, therefore, implies that interest not elsewhere required to be reinvested is now to be reinvested.

Since invested interest, like the original principal, is also a "fund in trust by the United States," interest earned upon the invested interest must be invested in turn. Hence the phrase, standing alone, would contemplate accumulation and successive compounding of interest. In the case of the Smithsonian fund, accumulation
[460] was clearly required. The purpose of the accumulation was to augment the fund while Congress pondered the difficult question of how best to effectuate the donor's purpose of founding "an Establishment for the increase and diffusion of knowledge among men." Congress did not, in fact, found the Smithsonian Institution until eight years after receipt of the legacy, *See* act of August 10, 1846, C. 178, 9 Stat. 102.[23]

[23]Little reinvestment of interest and no augmentation of the fund actually took place, because the bulk of the legacy was invested in Arkansas bonds, which the state repudiated. Letter of Secretary of Treasury to Speaker of the House, February 17, 1844,

[footnote continued]

Section 2 of the 1841 act, of course, did not mean that every cent of interest on the Indian trust funds had to be plowed back like the Smithsonian interest. Expenditure of income was necessary from time to time in the case of the Indian funds (except the Menominie fund) to accomplish the purposes of the trusts.

There is no need to do violence to the plain language of the 1841 act in order to permit such expenditure. The phrase "and the annual interest accuring thereon" does indeed provide for accumulation, but it does not stand alone. The next phrase, "except as otherwise required by treaty," exempts interest that must be spent for trust purposes from the command to invest.

Arguments that the phrase "and the annual interest accruing thereon" is not to be taken literally seem based
[461] on an assumption that Congress acted inadvertently in placing such language in section 2 after providing for reinvestment of the Smithsonian interest in section 1.

We believe Congress knew what it was doing. We believe section 2 of the 1841 act means what it says.

A problem sometimes encountered by trustees is what to do with income in excess of that needed to accomplish the purposes of the trust. The problem can arise only when the trustee's obligation to pay out of the trust is measured by some standard other than the trust income. For example, if a testator leaves a fund to a trustee with directions to pay the income over to the beneficiary as it accrues, there will be no problem. If instead he directs the trustee to use the income for the education of the beneficiary, the problem will arise if the income exceeds the cost of education.

reprinted in *Rhees* at 241-265. *See also* speech of Representative J.Q. Adams, reprinted at 268-273.

A far-sighted trustor may anticipate the problem of surplus income and include appropriate instructions in the trust instrument. Accumulation is a favored solution where the demand on the fund is fluctuating or increasing. *Cf.* G. Bogert, *Trusts and Trustees* §811 (2d ed., 1964).

Congress foresaw the problem of surplus income under one of the earliest trust funds of the Federal Government, the Navy Pension Fund, and provided for accumulation. See §§8-10, Act of April 23, 1800, c. 33, 2 Stat. 53.

Until 1841 Congress did not provide a rule to govern disposition of surplus income of the Indian trust funds.
[462] Most of the Indian trust funds then existing were of the class where the problem could not arise. For example, the trusts numbered 8, 15, 16, 17, and 18 in the list on pages 444-445, above, and all but the Osage and Delaware trusts listed in footnote 14, expressly required accruing interest "annually" to be paid to the Indians or wholly expended for specified purposes. In these trusts there could be no reinvestment of accruing interest, because it was "otherwise required by treaty."

Similarly, the problem of surplus income could not arise where the trustee was authorized to do nothing else with the income except reinvest it, as in the case of the Menominie fund.

The problem of surplus income did arise, however, in 1840 under the Chickasaw orphan fund, the Chippewa, Ottawa, and Pottawatomie mill fund, the Creek orphan fund, and the Kansas school fund. The incumbent Commissioner of Indian Affairs, T. Hartley Crawford, reinvested the surpluses on his own initiative.

The Commissioner gave full details on the reinvestments in his report of December 28, 1840. The report appears as an annex to the Message of the President to the Two Houses of Congress, H. R. Ex. Doc. No. 2, 26th Cong., 2d Sess., starting at page 228 (D-41). It was the latest document describing the administration of the Indian trust funds available when Congress considered the bill which became the 1841 act. If the Senate Finance Committee wished to examine existing practice, this is the document they would have consulted.

It is possible that the Committee reviewed the report and intended the reference to reinvestment of interest in
[463] section 2 of the 1841 act as conscious approval of Commissioner Crawford's action.[24] In any event, Congress did adopt as law a policy on reinvesting interest of the Indian trust funds similar to Crawford's and similar to that required for the Navy Pension Fund,[25] when it enacted:

> . . . all other funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty shall . . . be invested in stocks of the United States . . .

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[24]Mr. Crawford's administration of the Bureau of Indian Affairs seems to have inspired extraordinary confidence. Despite the change of administration and of control of Congress from Democratic to Whig in 1841, Crawford, appointed by President Van Buren in 1838, remained in office. He survived during the entire Tyler administration, serving longer than any other Commission of Indian Affairs in the 19th Century. F. Cohen, *Handbook of Federal Indian Law* 12 (1941).

[25]The Navy Pension Fund had been exhausted prior to adoption of the 1841 act. *See* H.R. Rep. No. 1, 27th Cong., 1st Sess. (Ser. 393, June 29, 1841). The last security held by the fund was sold on January 14, 1840. H.R. Ex. Doc. No. 145, 26th Cong., 1st Sess. 5 (Ser. 365, 1840) (D-19).

The surrounding circumstances as well as the language used show the requirement for accumulation in section 2 of the 1841 act was no inadvertence. It solved the problem of surplus income. The requirement for investment of accruing interest did not apply to interest a treaty commanded to be paid over to the beneficiary. It did not apply to interest currently needed to accomplish a treaty purpose, for example, to build schoolhouses. It applied to interest the treaty did not command to be paid out and which was for the time being in excess of that needed to accomplish the trust purposes.

The defendant, however, has appealed from the words of the law to its subsequent administrative construction, writing thus:

> . . . The documents furnished by the plaintiffs and defendant herein, along with other records to
> [464] the same effect reposing in the National Archives, attest to the attentive interpretation that the responsible officials gave to the statute [of 1841]. They perceived that without express provisions in a prior treaty or, after 1871, a ratified agreement, they had no authority to invest accruing interest. The matter was so self-evident to them that after 1840 the question as to whether they did or did not have that authority never arose.

We pass over the dubious proposition that an administrative interpretation may be shown by the fact that the administrators never considered the question, and reject the defendant's contention on the merits.

[465] First, the statement is not factually correct.[26] Second, history shows that the officers administering the Indian

[26]Interest on the Ottawa and Chippewa fund, established with an original principal of $20,000 under Article 4 of the Treaty of March 28, 1836, 7 Stat. 492, continued to be reinvested after

[footnote continued]

trust funds acquired $2,751,900 in state bonds for those funds subsequently to 1841. *Annual Report of the Commissioner of Indian Affairs for the Year 1876*, 275-277 (D-85). The construction of any part of a statute by men who repeatedly violated its clearest provision—to invest only in stocks of the United States—does not command respect.

1840. The fund grew to $62,496.40 by 1885. *See Ottawa and Chippewa Indians v. United States*, 42 Ct. Cl. 240, 245 (1907). Interest on the Creek Orphan Fund was also reinvested. This fund, amounting to $126,000 in 1840, grew to $251,055.97. *See* S. Rept. 411, 43d Cong., 1st Sess. (1874).

From the materials submitted by the parties it has not been feasible to identify the occasions subsequent to 1840 when trust fund interest was reinvested, even in the case of the Menominie fund, where accumulation was required by treaty.

The treasury appears not to have kept separate principal and interest accounts in the 1830's, '40's, and '50's. Published reports show only a cash account and an investment account. Interest was credited to the cash account when it was collected in the same manner as were additions to principal, such as the proceeds of land sales; and distributions to beneficiaries were debited in the same manner as sums expended to purchase investments. The investment account was simply a list of bonds held for the trust without indication of the source of the moneys used to purchase them. *See* Statements of the Secretary of the Treasury of the Chickasaw trust funds: H.R. Ex. Doc. No. 107, 29th Cong., 1st Sess. (1846) (D-77); H.R. Ex. Doc. No. 57, 32d Cong., 2d Sess., (1853) (D-50); and other reports in the same series cited in D-78.

The Commissioner of Indian Affairs in his annual report of November 25, 1854 (B-11) stated that it would be a good policy to reinvest certain accrued interest then on hand, but that he had not done so due to the high premium on Federal bonds, pending new legislation authorizing the purchase of state stocks. Such legislation was not enacted, and the record does not show whether the suggestion of reinvestment was pursued.

In any event, administrative observance of the 1841 act was so sporadic as to furnish no reliable guide to the meaning of the statute. *See* discussion and examples below.

Finally, in our opinion, no course of administrative action, however consistent, can prevail over language as clear and unambiguous as that of the 1841 act. *Louisville and Nashville Northern R. R. v. United States,* 282 U. S. 740, 759 (1931).

By the plain language of the 1841 act all interest on Indian trust funds which a treaty did not require to be paid out or otherwise used had to be invested. The act means exactly what it says.

3. ". . . when not otherwise required by treaty. . ."

The exception in the Senate amendment to H. R. 34, ". . . when not otherwise required by treaty", appears to have been adopted in response to Senator Sevier's objection that the House bill would violate Indian treaties.

The defendant points out that three treaties in force in 1841 required investment of Indian trust funds in state stocks. These treaties were (1) that of May 9, 1836, with the Chippewas of Swan Creek and Black River, 7 Stat. 503, (2) that of September 29, 1837, with the Sioux of the Mississippi, 7 Stat. 538, and (3) that of October 21, 1837, with the Sacs and Foxes of the Mississippi, 7 Stat.
[466] 540.

It is difficult to believe that Congress was primarily concerned with avoiding technical breach of these treaties when it adopted the phrase "when not otherwise required by treaty". It would have been nearly inexcusable in 1841 for a fiduciary to limit his investments to state bonds.

An earlier Congress had no qualms about putting the Seneca and Shawnee funds in state bonds, despite treaty language contemplating deposit of the money at interest

in the U. S. Treasury. *See* Act of June 14, 1836, discussed in Part I of this opinion. That action seems to have had no better justification than a desire to avoid paying interest during a period when the Government had no need to borrow. In other words, the trustee did not hesitate to harmlessly breach a treaty when its own self-interest so required. In 1841, on the other hand, with state bonds in default, the beneficiaries' interests would have justified, if not dictated, that the trustee disregard directions to invest in state bonds in order to buy safe, punctually paying Federal issues. *Cf. Restatement (Second) of Trusts* §167.

In fact, none of the three trust funds required by treaty to be invested in state bonds was so invested in 1841. The Chippewa fund had not yet been set up on the Indian Office's books, presumably because of delay in receipt of land sale proceeds. The Sioux of the Mississippi and Sac and Fox of the Mississippi funds were among for which Congress failed to appropriate the principal sum, paying only annual interest out of the treasury. They were never invested in state bonds. *See* above, footnote 14.

[467] The important function of the phrase, "when not otherwise required by treaty", in the context of the Senate amendment, was to save existing treaty provisions for the disposition of trust fund interest which were inconsistent with reinvestment.

4. ". . . shall in like manner be invested in stocks of the United States. . ."

The applicable definition of "stock" in what in 1841 was the latest edition of Noah Webster's *American Dictionary of the English Language,* the 13th, published at New York in 1834, read as follows:

12. Money lent to government, or property in a public debt.

See also footnote 6, above.

In the accepted contemporary meaning of its words, therefore, the phrase, "shall in like manner be invested in stocks of the United States", was a direction to invest in Federal public debt obligations.

The defendant argues, however, that the change of language made by the Senate Finance Committee did not alter the purpose of H. R. 34. The amendment was adopted, the defendant says, to minimize the bill's depressing effect on the market for state bonds, not to change its thrust from a limitation on the kind of securities in which Indian trust funds might be invested into a command to invest funds formerly permitted to lie idle.

In support of this contention the defendant refers us to the following bills of the 25th Congress, which, it states, show the course of Congressional thinking on the subject of trust funds:

[468] S. 257, 25th Cong., 2d Sess., introduced by Senator Hugh S. White, Chairman of the Committee on Indian Affairs, on March 9, 1838 (D-24). This was an administration bill, drafted in the Indian Office, and forwarded to the Chairman by President Van Buren's Secretary of War, Joel R. Poinsett, on March 6, 1838. *See* D-22 and D-23. It restated the 1837 act with amplifications and would have expressly required the trust funds to be invested in state stocks.

H. R. 791, 25th Cong., 2d Sess., introduced by Congressman Horace Everett (Whig, Vt.) on May 15, 1838 (D-27). This bill would have required investment of the Indian trust funds in "stock of the United States, to be created for that purpose . . ."

H. R. 867, 25th Cong., 2d Sess., introduced by Mr. Everett on July 2, 1838 (D-25). This bill would have provided for the payment of 5 percent interest on Indian trust funds deposited in the treasury, including funds required by treaty to be invested, during the period they might remain on deposit pending investment.

We have considered the cited bills, and their legislative history, and find nothing to cause us to doubt that the 27th Congress meant what it said in the 1841 act.

Common sense as well as the rules of statutory construction tell us that when Congress substitutes new language for old, by abandoning one bill for another, or striking out all after the enacting clause in a pending bill, it ordinarily intends a change in meaning. *See* 2 *J. Sutherland, Statutory Construction* §5015 (3d ed., 1943). The earlier bills failed, whereas the 1841 Senate Finance Committee amendment was approved and enacted. The different approach of the latter version may well be one of the reasons Congress adopted it after rejecting the earlier bills.

[469] *5. ". . . bearing a like rate of interest."*

The reference to 5 percent interest is evidently taken from the Act of June 14, 1836, discussed above. Notably, it is the only portion of sections 1 or 2 of the 1841 act which shows any intent to preserve pre-existing law. In fact, the phrase substantially extended the 5 percent floor, since the 1836 act, even as extended by the Act of January 9, 1837, applied only to a limited class of Indian trust funds, that is, those made up of the proceeds of sales of ceded Indian lands.

Five percent is a minimum figure. Nothing in the phrase prevents investment in Government bonds of

higher yield, such as were actually issued in 1841 and on several subsequent occasions.

Verbal analysis of the second section of the 1841 act emphasizes the sweeping character of the legislation against the defendant's claim that it was a mere housekeeping measure. While the Senate Committee could have attained increased safety for the Indian and Smithsonian trust funds by a narrow amendment, it chose to command that "all" funds held in trust by the United States, even "the annual interest accruing thereon", be invested in Government bonds, except when "otherwise required by treaty".

We turn back to the legislative history in search of the Senate Finance Committee's motives for adopting such far-reaching language.

[470] **D. Legislative history of the 1841 act—Part II: the Government needed the Indians' money.**

The Senate took H. R. 34 up later in the same day it was reported by the Finance Committee. Mr. Calhoun asked how the trust funds were to be invested if there should be no United States stock to be had. The Chairman of the Committee on Finance answered as follows)10 Cong. Globe 441, Sep. 8, 1841) (B-3):

> Mr. EVANS replied that all that had been taken into consideration in committee, and it was the unanimous impression that there would be a sufficient supply of United States stock in existence for the next three years at least, and that no difficulty could arise in that way. If, however, any difficulty of that nature should arise, provision could be made by Congress in time to meet it.

The defendant characterizes Senator Calhoun's question as "prescient", and Senator Evans' answer as "breezy". We find them quite the opposite.

The contemporary situation in regard to United States securities, which must have been that taken into consideration in committee, was this:

The U.S. Treasury kept afloat during the entire four years of the Van Buren administration (1837-1841) by issuing and reissuing one-year notes. During this period expenditures had exceeded revenues by $31,310,014.20.

The financial situation of the country became so bad that a special session of Congress was called to deal with the subject early in the new administration (Tyler's, Harrison, elected in 1840, having died after one month in office). Congress decided that the only remedy was a loan
[471] redeemable at a time sufficiently distant to allow the public finances, aided by returning prosperity among the people, a chance for recovery. A bill was introduced authorizing a loan of $12,000,000 for an eight-year term, at an interest rate not exceeding 5 percent. It passed, as the Act of July 21, 1841, c. 3, 5 Stat. 438; but not before heavy opposition had caused the term to be reduced to three years, and the interest raised to not exceeding 6 percent. *See* Debates on H. R. 5, 27th Cong., 1st Sess., 10 Cong. Globe 111, 161, 162, 164-167, 175, 176, 178-181, 189-191.

Clearly, the term of the 1841 bonds was what Senator Evans referred to in his answer to Senator Calhoun when he mentioned "the next three years".

The first of the bonds authorized by the Act of July 21, 1841, were sold in the third quarter of the year—at approximately the same time the Senate Finance Committee was considering H. R. 34. These were the first bonds issued by the United States since 1825, and the only interest-bearing Federal securities then outstanding, except the current year's treasury notes, which, because

of their extremely short term, would ordinarily be unsuitable for trust investment.

Bayley, *The National Loans of the United States,* (D-5), from which all the fiscal information in this discussion is taken, tells the sad subsequent history of the 1841 bond issue (p. 69):

[472] The loan proposed by the act of July 21, 1841 (5 Statutes, 438), owing to the short period which was to elapse before it became redeemable, does not appear to have met with much favor from those who had money to lend.[27]

> Up to December 20, 1841, the amount received, of the $12,000,000 asked for, was only $5,532,726.88, while the estimated deficiency on January 1, 1842, was $627,557.90, and the estimated excess of expenditures over revenue for the year 1842 was $14,218,570.68. In this emergency the Secretary [of the Treasury] recommended an extension of the time within which the residue of the loan, not yet taken, should be redeemable, the reissue of the treasury notes heretofore authorized by law, and an increase of the duties on certain classes of imports. A bill to allow the issue and reissue of treasury notes was introduced in the House January 5, 1842, and met with much opposition . . . It finally passed both houses and was approved January 31, 1842 (5 Statutes, 469).

[27]*See also* excerpt from John Quincy Adams' Diary for September 18, 1841 (quoted at page 61 of defendant's brief):

> . . . The secretary [of the treasury] has obtained one million, or a million and a half, of the twelve million loan authorized at a recent session of Congress, at five and a half per cent; but he wants already two millions more, and has no prospect of obtaining them at a rate lower than six per cent, if at all . . .

By the Act of April 15, 1842, c. 26, 5 Stat. 473, Congress amended the Act of July 21, 1841, to authorize a 20-year term for the bonds not yet sold, to permit them to be marketed under par, and to raise the ceiling on the issue to $17,000,000. Sales were still unsatisfactory; and by the Act of August 31, 1842, c. 287, 5 Stat. 581, Congress authorized the treasury to issue up to $6,000,000 of one-year notes in lieu of unsold bonds.

[473] Thus the probable motive emerges for the Senate Committee's changing H. R. 34 from the negative form of a prohibition on the purchase of state bonds to the positive one of a command to buy Federal bonds. The Federal Government needed the trust money. Its bonds were selling poorly, while the Indian trust funds alone offered a captive market reported to be worth $3,381,303.03 on the very day H. R. 34 first passed the Senate.[28]

The members of the Finance Committee, with their special expertise in public fiscal affairs, perhaps foresaw that the 1841 bond issue would be only the first of an indefinitely long series of similar borrowings. In the 132 years since Senator Calhoun addressed his question to Senator Evans, the Government has not once been out of debt. Federal bonds have always been available, although not always bearing 5 percent or greater interest.[29]

[28]*See* S. Doc. 116, 27th Cong., 1st Sess. (1841) (D-20). The Committee had a precedent for its action. J. Perry, *Trusts and Trustees,* §455 (3d ed., 1882), states:

> . . . It is said that the public policy in England of compelling trustees to invest trust funds in government funds originated largely in the necessities of the government, and the public advantage of creating a market and demand for government securities.

[29]U.S. Department of Commerce, *Historical Statistics of the United States, Colonial Times to 1957,* at 711 (1960); 27

[footnote continued]

[474] After short additional debate, H. R. 34, as amended by the Finance Committee, passed the Senate. On motion of Mr. Evans, the title was amended to delete the reference to prohibiting investment of United States funds in state stock.

H. R. 34 went back twice to the House, and to the Senate once more, before all differences were reconciled. The whole process took only two days. There was no conference. Significantly, the second section of the bill, applicable to the Indian trust funds, was never changed from the time the Senate Finance Committee first reported it. *See* House Journal, 27th Cong., 1st Sess., 448, 452, 470, 491, 497, 510, 515, 516 (D-33); Senate Journal, *id.*, 233, 248, 250, 253-258 (D-36).

The legislative history is thus consistent with the plain language of the Act of September 11, 1841. Congress was telling the executive officers to take all the uninvested trust moneys they had at their disposal, even the accumulations of interest, and buy Federal bonds. The legislative history gives no support to the defendant's interpretation that the act applies only to funds independently required to be invested, by treaty or some other law.

E. Administrative construction—a history of lawlessness.

Nevertheless, the defendant insists, administrative construction supports its interpretation of the Act of

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Encyclopedia Americana "United States," 660 (1967). Senator Calhoun's question to Senator Evans about what should be done if there were no Federal bonds to be had may have been disingenuous. Calhoun opposed the 1841 bond issue on the ground of its "establishing a system of permanent loans". 10 Cong. Globe 209 (July 22, 1841).

September 11, 1841. We do not admit that administrative construction could prevail over the plain language of such an unambiguous statute. *Louisville & Nashville Northern R. R. v. United States*, 282 U.S. 740, 759 (1931). We have, however, examined the evidences supplied by both
[475] parties of administrative construction between 1841 and 1880. The following are representative samples:

August 25, 1845: Commissioner of Indian Affairs advises the Secretary of War that Act of September 11, 1841, forbids investment of Indian trust funds in state bonds (D-49).

January 29, 1847: Secretary of Treasury advises president of the Bank of Tennessee that 1841 act prohibits exchange of state bonds in Chickasaw trust for other state bonds (D-51).

July 1, 1851: President of United States exchanges Alabama bonds in Creek orphan fund for Virginia bonds (B-29).

October 1, 1851: Secretary of Treasury exchanges $185,000 worth of Alabama bonds in the Chickasaw trust fund for Tennessee, Missouri, and state-guaranteed railroad bonds (D-50).

March 21, 1853: Attorney General advises Secretary of Interior that he may invest Wyandot funds in state stock despite treaty provision requiring investment in Federal stock (B-8). Before opinion is published, it is revised to delete reference to state stock and to cite 1841 act as requiring investment of U.S. stock bearing not less than 5 percent interest (D-58, 6 Op. Att'y Gen. 2).

November 26, 1853: Commissioner of Indian Affairs calls for funding Indian annuities and investing in state bonds (B-9).

June 24, 1854: Attorney General advises Secretary of Interior that 1841 act requires all funds held

in trust by the United States to be invested in Federal bonds (B-10).

August 10, 1854–November 30, 1857: Some time during this period Secretary of Interior invests $315,000 of Kaskaskia, Peoria, Piankeshaw, and Wea trust fund in state bonds. *See* Treaty of May 30, 1854 (proclaimed August 10, 1854), 10 Stat. 1082, and Commissioner of Indian Affairs Annual Report for 1857 (B-14).

November 27, 1861: Commissioner of Indian Affairs, apparently completely ignorant of 1841 act, calls in annual report for enactment of a law "that all Indian funds hereafter committed to the United States for investment shall be invested in United States stocks only" (B-16).

[476] July 1, 1863: Commissioner of Indian Affairs invests $26,000 of Indian trust funds, proceeds of matured Kansas bonds, in new Kansas bonds (D-81).

1863: Secretary of Interior sells at a premium $516,208.50 of Federal and state bonds in Indian trust portfolios and reinvests $497,850 of the proceeds in United States bonds (D-81).

September 2, 1876: Secretary of Interior informs J. & W. Seligman, stockbrokers of New York, that he is forbidden by 1841 act from investing Indian trust funds in United States four and one-half percent bonds (B-25).

October 31, 1876: Annual Report of Commissioner of Indian Affairs for Year 1876 (pages 275-77; *see* D-85) reveals $3,033,566.66 of state securities, all but $281,666.66 of these purchased or acquired by exchange after September 11, 1841, are held in Indian trust portfolios. All the issuing States except Kansas ($41,600 held) are in arrears on interest.

February 14, 1878: Secretary of Interior informs Senator Ingalls that he is obliged by existing law to reinvest proceeds of redemption of United States bonds held in the Indian trust funds in other United States bonds (B-26).

March 27, 1878: Acting Secretary of Interior in a letter to the chairman of the House Committee on Indian Affairs cites section four of act of January 9, 1837, c. 1, 5 Stat. 135, as authority to invest Indian trust funds "in any manner which shall be in his judgment most safe and beneficial". He does not mention 1841 act, which superseded section four of the 1837 act (B-27).

April 10, 1878: Secretary of Interior informs chairman of the House Indian Affairs Subcommittee that he is obliged by act of 1841 to invest proceeds of mature state and Federal bonds in United States bonds (B-28).

June 6, 1878: Attorney General refers to exchange in 1851 of state bonds in the Creek fund for other state bonds as an error of the President (B-29, 16 Op. Att'y Gen. 31, 37).

May 27, 1879: Duncan Thompson, identified by plaintiffs as Solicitor of Interior Department, advises Secretary that Secretary has no authority to sell
[477] bonds in the Indian trust funds without a special act of Congress. Also advises that it would be illegal to purchase 4 percent Federal bonds for the Indian trust even though they yield more than available 5 percent Federal bonds, due to premium on the latter (B-32). (Actually, Mr. Thompson was a clerk in the Indian office.)

June 23, 1879: Secretary of the Interior buys 4 percent bonds for the Indian trust funds (B-344, D-86).

The foregoing history does not show any consistent administrative construction of the Act of September 11, 1841. It shows instead that the administrators sometimes observed the law and sometimes did not.

After carefully examining all the legislative and historical materials submitted by both parties, we are more convinced than ever that the Act of September 11, 1841, meant exactly what it said.

F. The 1841 act became a lost law as a result of recodification.

The frequent administrative ignoring of the 1841 act was not helped by recodification. In 1873, Section 2 of the act became section 3659 of the Revised Statutes and was buried in the title dealing with the public moneys. The fourth section of the Act of January 9, 1837, although clearly superseded by the 1841 act, was not deleted, but carried forward as section 2096 in the title of the Revised Statutes dealing with Indians. When the United States Code was compiled in 1926, the 1841 act was dropped entirely, although it has never been re-
[478] pealed;[30] but the fourth section of the 1837 act appears to this day, in the title on Indians, as 25 U.S.C. §158. In the 1931 edition of the Code, the 1841 act was restored, as 31 U.S.C. §547a in the title on Money and Finance. Since the word "Indian" does not appear in the 1841 act, it is small wonder that in application to the Indian trust funds it has become, in effect, a lost law.

[30] A note in the United States Code Annotated states that it was omitted as superseded by 31 U.S.C. §547, entitled "Disposition of trust funds received from foreign governments for citizens of United States". This note does not appear in the official edition, and is obviously incorrect. *See* 44 Stat. 1010.

In American jurisprudence, however, a statute is not repealed by being forgotten, and must be enforced when rediscovered. *District of Columbia v. Thompson Co.*, 346 U.S. 100 (1953). As Justice Story stated in *Vidal v. Girard's Executors*, 43 U.S. (2 How.) 127, 196 (1844):

> . . . It is no proof of the non-existence of equitable rights that there exists no adequate legal remedy to enforce them. They may during the time slumber, but they are not dead.

IV. 1880 to 1918: INDIAN TRUST FUNDS DEPOSITED IN THE TREASURY

In the late 1870's, five percent United States bonds became more and more difficult to get as the Civil War issues matured or were called. In 1877, the Treasury sold a new issue at par with a four and one-half percent coupon; in 1878, it sold four percent bonds at a slight premium. To stay within the letter of the 1841 law, the Secretary of the Interior had to waste the principal of the Indian trust funds paying premiums as high as 19-3/4
[479] percent to replace called bonds with the few 5 and and 6 percent governments still outstanding. These had less than five years to run until maturity, or were already in the call period.[31]

In 1876, Secretary Zechariah Chandler asked Congress to authorize deposit of the Indian trust funds in the treasury, at 5 percent interest, in lieu of investment. Congress did not act. In 1879, when Carl Schurz was Secretary, the Interior Department quit trying to comply

[31] *See* letters of Secretaries of the Interior Chandler and Schurz reprinted in S. Rept. 186, 46th Cong., 2d Sess. (1880) (B-36); Annual Reports of the Commissioner of Indian Affairs for 1874 (page 457), 1875 (page 144), and 1876 (page 256) (Ex. D-83, D-84, and D-85); and R. Bayley, *National Loans of the United States* (D-5), pages 164-171 (1880).

literally with the 1841 act and purchased 4 percent United States bonds. The Acting Secretary stated that the net yield to the Indians was higher than on outstanding 5 percent issues after payment of the premium.[32]

There is no doubt that Secretary Schurz correctly interpreted the 1841 act. The primary purpose of the lawmaker overrides inconsistent clauses. 2 *J. Sutherland, Statutory Construction,* §§4704, 4932. The primary purpose of Congress in 1841 was to require that all funds held in trust by the United States be invested in Government bonds, not that they be invested at 5 percent. Indeed, if obtaining 5 percent had been Congress's primary purpose, there would have been no need for the 1841 act, since the 1837 act already provided for this
[480] minimum rate. The obligation to invest the trust funds, therefore, survived the extinction of 5 percent bonds.

Congress, however, soon resolved Secretary Schurz's dilemma. The act of April 1, 1880, c. 41, 21 Stat. 70, read as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.* That the Secretary of the Interior be, and he is hereby, authorized to deposit, in the Treasury of the United States, any and all sums now held by him, or which may hereafter be received by him, as Secretary of the Interior and trustee of various Indian tribes, on account of the redemption of United States bonds, or other stocks and securities belonging to the Indian trust-fund, and all sums received on account of sales of Indian trust lands, and the sales of stocks lately purchased for temporary investment, whenever he is of the

[32] S. Rept. 186, *supra,* also in B-34. *See also* Secretary Schurz to Secretary of the Treasury, February 8, 1879 (B-30).

> opinion that the best interest of the Indians will be promoted by such deposits, in lieu of investments; and the United States shall pay interest semi-annually, from the date of deposit of any and all such sums in the United States Treasury, at the rate per annum stipulated by treaties or prescribed by law, and such payments shall be made in the usual manner, as each may become due, without further appropriation by Congress.

The 1880 act was the first general legislation authorizing the deposit of Indian trust funds in the U.S. Treasury at interest; but many such funds had been deposited there earlier and were drawing interest under the authority of treaties, special legislation, or annual appropriation acts. The Annual Report of the Commissioner of Indian Affairs for 1879 (D-86) pages 309-10, shows $8,229,511.57 in Indian funds "held in trust by the government in lieu of investment" at 5 percent interest, while the funds invested in bonds totalled only $5,180,055.83.

[481] By its plain language the 1880 act does certain things and does not do others:

First, it makes deposit at interest an optional alternative to investment for certain trust moneys. It does not abolish investment in favor of deposit as the sole method of administering the Indian trust funds. The "best interests of the Indians" is the test for whether the funds are to be deposited or invested.

Second, the 1880 act applies to certain specified Indian trust moneys only. These are:

(1) Proceeds of redemption of the securities held in the trust funds in 1880.

(2) Proceeds of sales of lands ceded by the Indians.

(3) Proceeds of sales of the four percent Government bonds purchased in 1879.

See S. Rept. 186, 46th Cong., 2d Sess., 2 (1880) (B-36).

Third, it does not repeal the 1841 act. The direction of that statute to invest remains mandatory as to the trust funds not covered by the 1880 act, and optional as to those which are covered.

Incidentally, the act legalized the Secretary's 1879 purchases and authorized him to sell them if he needed special authority to do so, as his adviser, Duncan Thompson, thought.

The 1880 act directs the payment of interest on the deposits, but does not set the rate. Instead, it adopts the rates fixed by treaties or "by law". The legislative history clearly shows what the latter phrase means. It means 5 percent.

[482] The Committee on Indian Affairs reported out, and the Senate took up on January 7, 1880, the bill (S. 605) to authorize the Secretary of the Interior to deposit certain funds in the United States Treasury in lieu of investment. There was no written report. As amended by the committee, the bill read as follows (40 Cong. Rec. 212, B-35):

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Interior be, and he is hereby, authorized to deposit to the credit of the proper nation or tribe, in the Treasury of the United States, any or all sums belonging to the Indian trust fund now held or which may hereafter be received by him as Secretary of the Interior and trustee of various Indian tribes, whenever he is of the opinion that the best interests of the Indians will be promoted by such deposits in lieu of investments; and the United States shall pay interest thereon semi-annually at the rate per centum which is required by treaty stipulation or by act of Congress, or, in cases where the rate is not stipulated, at 4 per cent, from the respective dates of deposit; such payments to be made in the usual manner, as each may become due, without further appropriation by Congress.

Substantial debate ensued, in the course of which Senator Allison said (p. 213):

> As I understood this bill it simply provides that where money comes into the Treasury, by the payment of bonds or otherwise, it shall be deposited in the Treasury and draw the rate of interest prescribed in the treaties with the several tribes, if a special rate is prescribed. There are some treaties where no rate is fixed, but in 1855 it was provided by law that where there was no special treaty stipulation the rate should be 5 per cent.

There was no such law passed in 1855. Mr. Allison seems to have been alluding to the 1841 act.

[483] Senator Conkling said *(ibid.)*:

> . . . I wish the Senator would explain the effect of the words: "Or in cases where the rate is not stipulated, at 4 per cent. from the respective dates of deposit." What is to be the operation of this act upon a treaty which names no rate of interest, but which was made leaving that rate blank after an act of Congress had been passed declaring in all such cases it should be 5 per cent? What is the reason, in other words, that, in effect, that is not a treaty stipulation? . . . and if so, upon what principle is it, if we intend to observe treaty stipulations, that we propose this morning to declare that in all such cases hereafter the rate shall be not 5 per cent., but 4 per cent.?

Senator Edmunds said that the bill appeared to require the Secretary of the Interior to deposit accruing interest in the Treasury at interest. He added (p. 214):

> . . . The United States ought not to undertake to pay interest on these temporary deposits which are merely the interest belonging to the Indians and which by treaty stipulation we were not bound to pay interest on at all, but only to pay over through the Secretary of the Interior to the Indian tribes or for its benefit according to the stipulations of the respective treaties.

Mr. Edmunds appears oblivious of the 1841 act.

The bill was passed over.

When it came up again, on February 5, Senator Pendleton, by direction of the Committee on Indian Affairs, moved a substitute, stating that the Committee had endeavored to meet the objections of Senators Conkling and Edmunds. The substitute bill, which was adopted, is in the exact language of the present act. The reference to four percent interest was out; as well as the reference to "any or all sums belonging to the Indian
[484] trust fund." The bill was accompanied by a report, No. 186, 46th Cong., 2d Sess. (B-36), which quotes verbatim the Revised Statutes versions of both section 2 of the 1841 act and section 4 of the 1837 act. These sections expressly mention 5 percent interest.

The report came after too long an interval to have much weight in determining the true meaning of either act; but it does show that the Senate of 1880 thought that the United States was required by statute to obtain interest at the rate of 5 percent on all existing Indian trust funds, except where otherwise provided by treaty. *Cf. Rainwater v. United States,* 356 U.S. 590, 593 (1958); *Sioux Tribe v. United States,* 316 U.S. 317, 329 (1942).

The Indian Affairs Committee's effort to meet Senator Edmunds' objection to the earlier version of S. 605 resulted in a substantial gap of coverage in the 1880 act. Thus, all the invested Indian trust funds existing in 1880, regardless of their source, were authorized to be deposited in the treasury at interest; but the only new money that could be so deposited was proceeds of sales of ceded Indian lands to third parties. The 1880 act's coverage did not extend to sums received by Indian tribes after 1880 from any other source. *Fort Peck Indians v. United States,* Docket 184, 28 Ind. Cl. Comm. 171, 176-81 (1972).

The General Allotment Act of February 8, 1887, c. 119, 24 Stat. 388, partially filled the gap.

This law provided for dividing the reservations into parcels ranging in size from 40 to 320 acres, and alloting
[485] the parcels to individual Indians as their private property. Upon completion of the allotment of a reservation, the Indians were to become citizens of the United States and subject to the civil and criminal laws of the state or territory where they resided.

Section 5 of the General Allotment Act authorized the Secretary of the Interior to negotiate with the tribes to buy the parts of their reservations left over after allotment, the so-called "surplus lands." Actual sales to the United States were to be made by formal agreements requiring the ratification of Congress to become effective. Section 5 further provided (24 Stat. 390):

> And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at three per cent per

> annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof.

The reason for the low interest rate was explained by Senator Dawes, the original sponsor of the allotment bill, popularly called the Dawes Act, when he presented the conference report (18 Cong. Rec. 974, January 25, 1887) (D-98):

> The other change is the difference between 5 per cent. and 3 per cent. interest. Five percent. is the uniform rate of interest paid for Indian funds, and the answer to that on the part of the House was that that rate was established at a time when all interest was at that high rate; all interest now is at 3 per cent. and less, and they insisted upon those two amendments, and the Senate yielded.

[486] The three percent provision of the Allotment Act applies only to moneys paid by the United States itself for the purchase of "surplus" reservation land pursuant to agreements negotiated under authority of the same Allotment Act.

There is not merely an absence of overlap between the 1880 act and the General Allotment Act, but a gap between them. Prior to 1929 there would appear to be no general law authorizing the Treasury to pay interest on the proceeds of any sales of Indian land, except of those held in trust by the United States for the purpose of sale, and of those sold directly to the United States pursuant to the Dawes Act. Direct sales to the United States under other authority, for example, under flood control project legislation, would not be covered. Similarly, such direct sales to third parties as might be authorized by special acts of Congress would not be covered. Revenues from sources other than land sales were not covered.

As to Indian tribal moneys not covered by either the 1880 act or the General Allotment Act, if the Government undertook to hold them in its custody, the unrepealed mandate of the 1841 act applied. It continued to require such trust funds to be invested in United States bonds.

V. THE IMPL FUND: 1883–1930

During the course of the nineteenth century, as the Federal Government assumed increasing control over the internal affairs of the Indian tribes, its agents began collecting the miscellaneous revenues of the reservations.
[487] They collected the proceeds of sale of articles made and crops raised by the Indians; fees paid by white people for pasturing cattle or otherwise using reservation lands; proceeds of sales of hides from slaughtered Indian cattle and of reservation timber, sawed lumber, and other wood products; royalties on coal; fines levied on Indians by the Courts of Indian Offenses; and moneys from numerous other sources. Prior to 1876 the agents were not required to report these collections to Washington. In that year, the Indian Office undertook an investigation of what became of such funds, and asked an opinion of the Treasury Department as to whether they were public moneys. The Secretary of the Treasury ruled that they were not, and could not be deposited in the Treasury.

As a result, the Interior Department ordered the Indian agents in the field to retain and account for these funds, and expend them only upon the personal direction of the Commissioner of Indian Affairs. Moneys representing the proceeds of labor of individual Indians were ordered to be expended for such individuals' own benefit.[33]

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[33] *See* letter of February 21, 1881, Acting Chief Clerk, Office of Indian Affairs, to Secretary of Interior (in exhibit D-64), and

[footnote continued]

This system of handling the miscellaneous revenues was not a success; and Congress, by a pencilled rider on the deficiency appropriation bill of March 3, 1883, c. 141, 22 Stat. 590, enacted as follows:

[488] The proceeds of all pasturage and sales of timber, coal, or other product of any Indian reservation, except those of the five civilized tribes, and not the result of the labor of any member of such tribe, shall be covered into the Treasury for the benefit of such tribe under such regulation as the Secretary of the Interior shall prescribe; and the Secretary shall report his action in detail to Congress at its next session.

We have found no legislative history of the quoted paragraph, which we shall refer to hereinafter as "the 1883 act". Both parties agree, and we agree, that its purpose was improved fiscal control (pl. brief, p. 27; def. brief, p. 98). The 1883 act is similar to the first section of the Act of January 9, 1837, discussed in Part II of this opinion. That section, a part of the 1837 act not superseded by the 1841 act, required the proceeds of sales of Indian land ceded in trust by treaty to be paid into the treasury prior to disbursement to the Indians or investment for their benefit.[34] The 1883 act extended the familiar pattern of centralized accounting to the proceeds of reservation products.

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letter of March 20, 1883, Commissioner of Indian Affairs to Secretary of the Interior (D-65).

[34] "Covered into the Treasury" and "paid into the Treasury" are synonyms. *Rice v. United States,* 21 Ct. Cl. 413, 419-420 (1886), *aff'd by equally divided court,* 122 U.S. 611 (1887), *quoted with approval in United States v. Johnston,* 124 U.S. 236, 253 (1888).

The treasury misnamed the new fund "Indian Moneys, Proceeds of Labor", abbreviated "IMPL", omitting the word "not" between "Moneys" and "Proceeds", perhaps by clerical error.

[489] No interest was paid on the IMPL fund until the Act of June 13, 1930, c. 483, 46 Stat. 584, expressly required its segregation on the books of the treasury into separate accounts for the respective tribes, and payment of 4 percent annually from July 1 of that year on each account with a balance exceeding $500. Previously there was only a single fund in the treasury, the books showing each tribe's share being kept in the Indian Office.

We have found no earlier provision for paying interest on the IMPL account, and conclude that the treasury acted lawfully in not crediting it with interest during the period between 1883 and 1930.

The plaintiffs contend that the Act of September 11, 1841, 31 U.S.C. §547a (1970), applied to the IMPL fund. That act does not direct the Government to pay interest on trust funds, but rather to invest them. In fact, the IMPL fund was not invested, but lay idle in the treasury for 47 years.

There is nothing inconsistent between the 1883 act's requirement for covering the IMPL moneys into the treasury and the 1841 act's requirement for investment. During the nineteenth century, being covered into the treasury at Washington was the normal prerequisite to investment of Indian trust funds collected in the field. Indeed, we are not aware that any such funds were invested at the field level during the latter half of the century.

[490] Section 2 of the 1837 act, which governed the proceeds of sale of trust lands (required to be paid into the treasury by section 1) provided as follows (5 Stat. 135):

> . . . all sums that are or may be required to be paid, and all moneys that are or may be required to be invested by said treaties, are hereby appropriated in conformity to them, and shall be drawn from the Treasury as other public moneys are drawn therefrom, under such instructions as may from time to time be given by the President.

From the absence of similar language in the 1883 act it may be inferred that the IMPL funds were to stay in the treasury, pending later appropriation by Congress. The Acting Secretary of the Treasury in a letter to the Secretary of the Interior dated November 26, 1883, (D–71), took the position that they could not be paid out without further legislation. The question of whether they could be invested without further legislation was not before him, and he expressed no opinion on it.

In fact, the legal situation in regard to investing the IMPL funds was markedly different than in regard to spending them. If they were trust funds, authority to invest already existed.

Earlier in this opinion we have determined that the 1841 act was self-executing, as against the defendant's contention that it operated only on funds required to be invested by some other law. The act meant what it said.

[491] When Congress used the word "all" it did not mean "some". The language and legislative history of the 1841 act no more support an implied exclusion from coverage of future Indian trust funds than they do for those existing in 1841 which were not otherwise required to be

invested. The usual rule of prospective operation applied to the 1841 act. The rule is stated thus in 2 *J. Sutherland, Statutory Construction,* §5102 at 509 (3d ed., 1943):

> Standards established by the medium of legislation are usually intended to have considerable breadth with the result that a statute may cover many situations that do not immediately occur to the mind. And so it is a general rule of statutory construction that a statute, expressed in general terms and words of present or future tense, will be applied, not only to situations existing and known at the time of enactment, but also prospectively to things and conditions that came into existence thereafter.

Further, we see no reason why the 1841 act should not operate on funds held in trust by the United States in its treasury to the same extent as on trust funds held elsewhere. The mention in the 1841 act of one exception to its applicability, *viz.*, the clause "when not otherwise required by treaty", implies that there are no other exceptions. 2 *J. Sutherland, Statutory Construction,* §4915, note 6 at 413 (3d ed., 1943); *cf. Smith v. Stevens,* 77 U.S. (10 Wall.) 321 (1870).

If an appropriation were necessary to get the IMPL
[492] funds invested, the 1841 act would serve the purpose, provided they were trust funds.[35] Article I, §9 Clause 7

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[35] A separate appropriation would have been necessary before the so-called trust funds mentioned in footnote 14 could be invested, since these were wholly fictitious. Their principal amounts had never been severed from the general fund in the treasury. They were mere unfulfilled promises of the United States to put up certain moneys. Moreover, by annually appropriating interest and refusing to appropriate principal although repeatedly requested to do so, Congress showed its intention that these imaginary funds were not to be invested, prior law, if any, to the contrary notwithstanding.

[footnote continued]

of the United States Constitution[36] requires no special formula for an appropriation; and Congress did not
[493] provide such a formula until after 1841,[37] thus confirming that none was required before.[38]

The IMPL fund, on the other hand, like the various Indian proceeds of lands funds in the treasury, represented actual moneys of the Indians paid into the treasury from outside sources. It did not have to be severed from the general fund, since it did not derive from the general fund and was not intermingled with the general fund, always being carried in a separate account.

[36] "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

There is a split of authority on whether this clause applies to trust funds. *Stitzel-Weller Distillery v. Wickard*, 73 App. D.C. 220, 118 F.2d 19 (1941), held it did. *Emery v. United States*, 186 F.2d 900 (9th Cir.), *cert. denied*, 341 U.S. 925 (1951), held it did not. *See also United States v. Johnston*, 124 U.S. 236, 253 (1888).

[37] *See* 31 U.S.C. §627 (Act of June 30, 1906, c. 3914, §9, 34 Stat. 764).

[38] The language of section 2 of the 1841 act is quite similar to section 4 of the Act of June 14, 1836, discussed in Part I of this opinion, which reads as follows (5 Stat. 47):

> . . . the Secretary of War be and he is hereby authorized and directed to invest, in a manner which shall be, in his judgment, most safe and beneficial for the fund, the sum of thirty-three thousand nine hundred and twelve dollars and forty cents, being money in the Treasury as the proceeds of lands purchased from the Seneca Indians of Sandusky by a treaty concluded on the twenty-eighth day of February, eighteen hundred and thirty-one, from the Senecas and Shawanese by a treaty concluded on the twentieth of July, eighteen hundred and thirty-one, and from the Shawanese, by a treaty concluded on the eighth of August, eighteen hundred and thirty-one, and upon which sum the United States are, by stipulations in the said treaties, bound to pay to the said Indians an annual interest at the rate of five per centum per annum;

[Footnote continued]

It is not necessary, however, to construe the 1841 act as an appropriation, since it did not require any funds to be drawn out of the treasury. The 1837 act contemplated the purchase of state bonds, which would normally involve disbursement of the price. The 1841 act on the other hand required the purchase of Federal bonds,
[494] which necessitated only a bookkeeping operation within the treasury—debiting the price of the bonds to the trust account and crediting it to the general fund. By 1883, due to recent legislation,[39] even the bonds would remain in the physical custody of the treasury.

> *Provided*, That the said Secretary shall make no investment of the said sum, or any portion of it, at a lower rate of interest than five per centum per annum.

Despite the lack of the word "appropriate" in the section, the Seneca and Shawnee funds were withdrawn from the treasury under its authority and invested in state stocks. *See* D-41.

[39] Act of June 10, 187[illegible] c. 122, 19 Stat. 58. The text follows:

> CHAP. 122—An act transferring the custody of certain Indian trust-funds
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> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all stocks, bonds, or other securities or evidences of indebtedness now held by the Secretary of the Interior in trust for the benefit of certain Indian tribes shall, within thirty days from the passage of this act, be transferred to the Treasurer of the United States, who shall become the custodian thereof; and it shall be the duty of said Treasurer to collect all interest falling due on said bonds, stocks, &c., and deposit the same in the Treasury of the United States, and to issue certificates of deposit therefor, in favor of the Secretary of the Interior, as trustees for various Indian tribes. And the Treasurer of the United States shall also become the custodian of all bonds and stocks which may be purchased for the benefit of any Indian tribe or tribes after the transfer of funds

[Footnote continued]

We reject the proposition that the 1883 act was somehow inconsistent with the 1841 act and authorized the IMPL fund to lie idle even if it was a "fund held in trust by the United States".

[495] Although the Commissioner of Indian Affairs promptly asked for legislation authorizing him to withdraw and spend the IMPL moneys, Congress acted only four years later, after being prodded by a message from the President. Sen. Ex. Doc. 107, 49th Cong., 1st Sess. (D–73). A floor amendment to the appropriation act of March 2, 1887, c. 320, 24 Stat. 463, was adopted, providing as follows:

> That the Secretary of the Interior is hereby authorized to use the money which has been or may hereafter be covered into the Treasury under the provisions of the act approved March third, eighteen hundred and eighty-three, and which is carried on the books of that Department under the caption of "Indian moneys, proceeds of labor," for the benefit of the several tribes on whose account said money was covered in, in such way and for such purposes as in his discretion he may think best, and shall make annually a detailed report thereof to Congress.

herein authorized, and shall make all purchases and sales of bonds and stocks authorized by treaty-stipulations or by acts of Congress when requested so to do by the Secretary of the Interior: *Provided,* That nothing in this act shall in any manner impair or affect the supervisory and appellate powers and duties in regard to Indian affairs which may now be vested in the Secretary of the Interior as trustee for various Indian tribes, except as to the custody of said bonds and the collection of interest thereon as hereinbefore mentioned.

Presenting the amendment, Congressman Perkins stated (18 Cong. Rec. 376) (January 5, 1887) B–40):

> . . . This is prepared by the Commissioner of Indian Affairs, and is recommended by the Secretary of the Interior. It is also recommended by the President. The object, as I have already suggested, is simply to amend the act of 1883, so that this fund can be paid out for the benefit of the Indians to whom it belongs upon the orders of the Secretary of the Interior. . .

There is nothing in the 1887 amendment inconsistent with investment of such part of the IMPL fund as was not paid out of the treasury.

If the IMPL fund in the treasury was a trust fund, from 1887 on there were two harmonious statutes operating
[496] upon it. The 1887 act authorized the Secretary to withdraw the money in order to use it for the tribes' benefit; and the 1841 act commanded the money not so withdrawn, and the annual interest accruing thereon, to be invested in Government bonds.

It can be argued that the 1887 act authorized expenditure of principal but not interest on the IMPL fund. We are not convinced that this construction is
[497] correct.[40] Assuming that it was, however, if the IMPL

[40] "Interest goes with the principal, as the fruit with the tree." Cf. *Himley v. Rose,* 9 U.S. (5 Cranch) 311, 319 (1809) (dissenting opinion of Johnson, J.).

As noted in Part III, A, of this opinion, several treaties creating trust funds contained no express investment provisions. Typical language creating such a fund appears in Article 5 of the Kansas treaty of June 3, 1825, 7 Stat. 245:

> . . . thirty-six sections of good lands, on the Big Blue river, shall be laid out under the direction of the President of the United States, and sold for the purpose of raising a

[Footnote continued]

fund had been invested and the interest, accumulating beyond the Secretary's power of withdrawal, had been needed for the Indians, remedial legislation would doubtless have been obtained.

The 1887 floor amendment was written in the Interior Department, by administrators who had a history of overlooking the 1841 act, and adopted by Congress with minimal consideration. Neither in the debate nor in any of the executive correspondence brought to our attention is the 1841 act even mentioned. Clearly the 1887 amendment was not intended to repeal it or construe it. Certainly the 1887 amendment did not supersede the 1841 act's mandate that surplus income be reinvested. The only effect of the amendment was to make provision for expenditures from the statutory IMPL fund similar to the treaty provisions which authorized expenditures from

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fund, to be applied, under the direction of the President, to the support of schools for the education of the Kansas children, within their Nation.

When such trust funds were invested, interest was applied to the objects of the trust without further legislation, presumably on the authority of the quoted maxim.

In any event, an appropriation would not have been necessary to get interest on the IMPL fund out of the treasury. In the absence of an authorizing statute, like the 1883 act applicable to principal, the interest could not have been covered into the treasury in the first place. The act of June 10, 1876 (quoted above in note 39), provided that interest on stocks and bonds in which Indian trust funds were invested be deposited in the Treasury of the United States and a certificate of deposit therefor issued to the Secretary of the Interior. For the distinction between moneys "covered into" the treasury, which could not be withdrawn without appropriation, and moneys "deposited with the Treasurer," which could be, see *United States v. Johnston*, 124 U.S. 236, 253 (1888).

the earlier trust funds. After 1887 the 1841 act continued to apply to both principal and interest of the IMPL fund in the treasury. It ceased to apply only to those parts of the fund lawfully withdrawn from the treasury by the Secretary of the Interior, that is, to those moneys withdrawn from the fund which he actually put to use for the benefit of the Indians.

Was the IMPL fund "held in trust by the United States" within the meaning of the 1841 act?

In Part III of this opinion, we have reviewed all the Indian trust funds in existence in 1841–funds which the
[498] defendant concedes were covered–and found widely varying degrees of formality in their creation.

No particular formality or technicality was required to bring a fund within the purview of the act in 1841; and we can see no reason for applying a more strict rule thereafter.

As we have also noted, the bill which became the 1841 act was routed through the House Ways and Means Committee and the Senate Finance Committee, the two chambers' fiscal committees, rather than their Indian Affairs Committees. In both House of Representatives and Senate the reporting committee's objective was a financial one of sweeping character. In the House, it was to stop further investment of Federal funds, whether of public or trust nature, in state stocks. In the Senate, it was to obtain use of trust funds for the Government itself, to help meet its unending need to borrow money and to firm up the market for its bonds. Such objectives militate for an inclusive definition of "funds held in trust by the United States".

Needless to say, we believe the definition should be no more nor less broad now that the Indians are requesting

their lost income, than it was in 1841 when the Government needed their money.

In the absence of a definition in the statute, we look for the definition of the legal term "trust" to sources which would reflect the common understanding among
[499] the legal profession of the time, that is to such sources as the legislators of 1841 would have looked to. 2 *J. Sutherland, Statutory Consturction,* §4919, at 438 (3d ed., 1943); *cf. United States v. Native Village of Unalakleet,* 188 Ct. Cl. 1, 12, 411 F. 2d 1255, (1969), answering certified question in Docket 285, 19 Ind. Cl. Comm. 140 (1968).

Joseph Story, at the same time justice of the Supreme Court of the United States and professor of law in Harvard University, was preeminently authoritative on the American law of the first half of the 19th Century. He defined "trust" thus, in his *Equity Jurisprudence,* §964 (1836):

> A Trust, in the most enlarged sense, in which that term is used in English Jurisprudence, may be defined to be an equitable right, title, or interest in property, real or personal, distinct from the legal ownership thereof. In other words, the legal owner holds the direct and absolute dominion over the property in the view of the law; but the income, profits, or benefits thereof in his hands belong wholly, or in part, to others. The legal estate in the thing is thus made subservient to certain uses, benefits or charges in favor of others; and these uses, benefits or charges constitute the Trusts, which Courts of Equity will compel the legal owner, as trustee, to perform in favor of the *cestui que trust,* or beneficiary.

In section 980 Story wrote:

> . . . Express Trusts are those which are created by the direct and positive acts of the parties by some
> [500] writing, or deed, or will. Not, that in those cases, the language of the Instrument need point out the very nature, character and limitations of the trust in direct terms, *ipsis verbis*; for it is sufficient if the intention to create it can be fairly collected upon the face of the instrument from the terms used; and the trust can be drawn, as it were, *ex visceribus verborum.*[41]

Quoting a New York case decided in 1823, Justice Levi Woodbury, the former Secretary of the Treasury and Senator, wrote for a unanimous Supreme Court in *Benham v. Taylor*, 46 U.S. (5 How.) 233, 274 (1847):

> So, "every person who receives money to be paid to another, or to be applied to a particular purpose, to which he does not apply it, is a trustee, and may be sued either at law, for money had and received, or in equity, as a trustee, for a breach of trust."

See also Burnell v. United States, 44 Ct. Cl. 535 (1909).

J. Perry, *A Treatise on the Law of Trusts and Trustees,* §13 (3d ed. G. Choate, 1882), the latest American treatise on trust law available when Congress passed the act of March 3, 1883, shows that the concept was the same at that time. In §41 Perry stated that the United States and each of the separate states may be a trustee, although equity could not enforce the trust against sovereigns, adding:

[41]Story is quoted from the first edition, published in 1836. The second edition, published in 1839, which was the most recent at the time Congress enacted the act of September 11, 1841, makes no substantive change in these passages.

. . . A subject may have a clear right, but no remedy; in such case he must petition the legislative power, and there is no reason to suppose that his right would be refused.[42]

[501] Perry expressly mentions the Smithsonian Fund (on page 30) as an example of the United States as trustee.

The above quotations are consistent with applicable definitions of trust in other texts of the 19th century and appear identical in concept with the modern view of trusts.[43]

The American Law Institute, *Restatement of the Law of Trusts* (1935) was cited by the Supreme Court among the controlling authorities in the Indian trust case of *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942). Section 2 of the *Restatement* defines a trust as follows:

A trust, as the term is used in the Restatement of this Subject, when not qualified by the word

[42]*See also, Vidal v. Girard's Executors,* 43 U.S. (2 How.) 127 (1844); T. Lewin, *Practical Treatise on the Law of Trusts and Trustees* 84-85 (1st ed., 1837); Restatement (Second) of Trusts §95 (1959).

[43]*See* J. Bouvier, A Law Dictionary Adapted to the Constitution and Laws of the United States of America and of the Several States of the American Union, "Trusts" (1st ed., 1839); J. Willis, Practical Treatise on the Duties and Responsibilities of Trustees 2 (reprinted in Philadelphia, 1839), 295, states "trusts of chattels personal are of the most frequent occurrence."

The Introductory Note to the Second Restatement of Trusts (1959), states:

. . . In spite of the merger of courts of law and equity in England and in most of the American states in the nineteenth century, the distinction between legal interests and equitable interests still persists, and in its essentials the law of Trusts is not changed.

"charitable", "resulting" or "constructive," is a fiduciary relationship with respect to property for the benefit of another person, which arises as a result of a manifestation of an intention to create it.

[502] Comment:

a. *Terminology*. The term "express trust" is used to indicate a trust as here defined whenever it is desirable to emphasize the contract between a trust as here defined on the one hand and a resulting trust or a constructive trust on the other hand.

To create an express trust it has never been necessary to state, "I hereby create an express trust." The *Restatement* continues:

§24. Mode of Manifestation of Intention

(1) Except as otherwise provided by statute, the manifestation of intention to create a trust may be made by written or spoken words or by conduct.

(2) No particular form of words or conduct is necessary for the manifestation of intention to create a trust.

Comment:

* * * * * * *

A trust may be created although the settler does not use the word "trust," and the fact that the settlor uses the word "trust" does not necessarily indicate that a trust is intended. . . .

Illustrations:

1. A, the owner of certain bonds, declares that he holds the bonds "for the use of B" or "for the benefit of B." In the absence of evidence of a contrary intention, A holds the bonds in trust for B.

In our view the IMPL fund passes the strictest test for an express trust.

The United States held the Indians' land in trust. The various revenues which made up the IMPL fund arose as a result of the Government's administration of this land
[503] trust. Indeed, most of them arose directly from the land, as mining royalties, grazing fees, considerations for grants of rights of way, and stumpage for timber growing on the land. The Government clearly had legal title to the money as well as the land. *Cf. United States v. Brindle*, 110 U.S. 688, 693 (1884); *Confederated Salish and Kootenai Tribes v. United States*, 175 Ct. Cl. 451 (1966), *cert. denied*, 385 U.S. 921 (1966).

The Government, however, expressly acknowledged that the Indians were the equitable owners of the fund.

The first acknowledgment was in the act of 1883, which stated that the moneys covered into the treasury should be "for the benefit of such tribe" (22 Stat. 590).

The second was in the Message of President Grover Cleveland to the Congress of May 18, 1886, recommending action to enable the Secretary of the Interior to withdraw and use moneys from the IMPL fund. President Cleveland quoted the Commissioner of Indian Affairs as follows (S. Ex. Doc. 107, 49th Cong., 1st Sess.–D. 73):

> The evil complained of is the dissatisfaction of certain Indians because they are deprived of money which is rightfully theirs. . . .
>
> The complaints of the Indians are just.
>
> It is not disputed that this money belongs to them, nor is it disputed that it was the intention of Congress, as expressed in the act of March 3, 1883, that they should have the benefit of it.

And the third acknowledgment was by the act of March 2, 1887, which authorized use of the IMPL moneys "for the benefit of the several tribes on whose account said money was covered in. . ." (24 Stat. 463).

[504] Thus, all requirements for an express trust of the IMPL fund are met.

We are aware that the Supreme Court, in *Chippewa Indians v. United States*, 307 U.S. 1, 3 (1939), stated that an interest-bearing fund in the U.S. Treasury, created by statute for the benefit of Indians from the proceeds of sale of their ceded lands, was not a "technical trust". In our opinion this case has no bearing on whether the IMPL fund was "held in trust by the United States" within the meaning of the 1841 act.

In the *Chippewa* case, appellants contended that the beneficiary of the fund was not the tribe but individual Chippewas. Those living during the 50-year duration of the trust, appellants claimed, were income beneficiaries, and those living at the expiration were remaindermen. Since the "remaindermen" never consented and, being unascertainable in advance, could not consent to various changes in the trust terms which had resulted in expenditures from principal, appellants contended the United States was bound to restitution under "plain principles of equity". Appellants did not deny that the expenditures were for the benefit of the Indians.

The court held the Chippewa fund was not "a strict and conventional trust for classes of individual Indians", but a tribal fund. It did not deny the fund's trust status, writing as follows (307 U.S. at 5):

> We hold that the Act did not tie the hands of Congress so that it could not depart from the plan envisaged therein, in the use of tribal property for the benefit of its Indian wards.

The United States has probably never held a fund in strict and conventional trust for individuals. Certainly the Indian trust funds existing in 1841, to which the
[505] defendant concedes the act of that year applied, were not of such character. Indeed, as we have seen, several of them were created without authority of law.

In a word, the operation of the 1841 act was never intended to be limited to "technical" trusts.

Since the Government never lays aside its sovereign power, there are necessarily substantial differences between trusts administered by the United States and private trusts. The Government as trustee, for example, can lawfully borrow the trust moneys, by depositing them in its treasury or buying its own bonds, conduct which would be breach of trust in a private trustee. *Menominee Tribe v. United States,* 101 Ct. Cl. 10, 20 (1944). Congress may change the terms of an Indian trust, without liability if the change is beneficial to the cestui. *Fort Peck Indians v. United States,* 132 Ct. Cl. 373 (1955), *aff'g,* Docket 183, 3 Ind. Cl. Comm. 78 (1954).

But administrative officers of the United States may not change or disregard trust terms enacted by Congress. *Work v. Mosier,* 261 U.S. 352 (1923).

While the United States is not a technical or conventional trustee as known to private law, in regard to moneys it has undertaken to administer for Indians it is a fiduciary, bound to a standard no less exacting, if somewhat different, from that applicable to private trustees. *United States v. Mason,* No. 72-654 (U.S., June 4, 1973). As stated in *Seminole Nation v. United States,* 316 U.S. 286, 296-297 (1942):

> Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged
> [506] itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

The treasury was slow to recognize the trust nature of the IMPL fund. With the same apparent unconcern by which they misnamed it, treasury officials misclassified the IMPL fund–as miscellaneous receipts and expenditures of the Indian Service–without acknowledgment of its trust status. *See* U.S. Treasury, *Statements of Receipts and Expenditures,* for fiscal years 1884 through 1907.

In 1908, without any public explanation, the treasury began listing the IMPL as a trust fund, and has continued to do so until the present time.

The reason for the change was as follows. In October of 1907, Secretary of the Treasury George B. Courtelyou submitted a list proposing classification of all accounts appearing in the detailed ledgers of appropriations in his office to the Comptroller of the Treasury, R. J. Tracewell, for review and approval. In an opinion dated December 14, 1907, the Comptroller advised the Secretary that all funds in the treasury should be grouped into three classes: (1) the general fund, (2) special funds, (3) trust funds. *See Disposition of Customs Duties and Tonnage Taxes on Articles and Foreign Vessels Coming from the Philippine Archipelago. Three Funds in the Treasury Distinguished,* 14 Comp. Dec. 361 (1907). The Comptroller proceeded to revise the Secretary's list in accordance with this decision, on the basis of "a very

careful search of the statutes under which the large number of appropriations have been raised".

[507] The Comptroller returned the list, with his corrections, attached to an unpublished decision dated June 13, 1908 (a copy is available for inspection in the law library of the General Accounting Office). The decision contains the words quoted above and the following definitions:

> Trust funds are (a) moneys or securities received from private parties, or as the proceeds of private property which the law authorizes to be received into the Treasury to be held for the use of such parties or to be applied to some designated object, or paid to some designated beneficiary or beneficiaries; (b) or moneys in the Treasury which Congress directs to be placed to the credit of private parties and held subject to future disposition for the use of such parties in payment for services or private property purchased; (c) or moneys in the Treasury directed to be credited to a particular fund for use in the discharge of some obligation assumed by the Government in relation to the subject matter giving rise to the creation of such fund out of moneys in the Treasury not otherwise appropriated.

The IMPL fund was classified as a trust fund in the accompanying list.

The Comptroller's decision of 1908 appears peculiarly significant as the first official ruling on the question of whether the IMPL was a trust fund. We have found no earlier decision denying the fund's trust status. Officials competent to make the determination appear simply never to have considered the question before 1908. The 25 year lag from 1883 is not, in point of fact, an unusually long period for questions of Indian-Government relations to await legal resolution.

There was no new legislation in 1908 affecting the IMPL fund and no change in its actual use. The
[508] Comptroller's decision and the Secretary of the Treasury's implementation of it were thus only recognition of the true status of the fund from its beginning.

The IMPL fund has been consistently identified as a trust fund since 1908, by the Comptroller of the Treasury,[44] the Comptroller General,[45] and the Congress.[46] So far as we are aware, the defendant has not questioned the trust status of the IMPL fund until the oral argument in this case.

We conclude that Indian Moneys, Proceeds of Labor has always been a fund held in trust by the United States since its establishment in 1883. It, and the annual interest accruing thereon,[47] should have been invested in Federal securities pursuant to the act of September 11, 1841 (31 U.S.C. §547a), except during periods when alternative means, authorized by later legislation, were used to make such moneys productive.

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[44] 17 Comp. Dec. 995 (1911); 16 Comp. Dec. 20 (1909).

[45] Letter to Secretary of Interior, February 11, 1926, quoted in H.R. Rept. 897, 69th Cong., 1st Sess. (1926–B-57); Decision A-27308, 8 Comp. Gen. 625 (1929).

[46] Permanent Appropriations Repeal Act, June 26, 1934, §20, 31 U.S.C. §725s(a)(20).

[47] In many cases accumulations of Indian trust fund interest are now being invested in United States securities. *See* Combined Statement of Receipts, Expenditures and Balances of the U.S. Government, Fiscal Year 1971, at 492-509.

VI. 1918 TO PRESENT; TWENTIETH CENTURY STATUTES PROVIDE GREATER FLEXIBILITY FOR ADMINISTRATION OF THE INDIAN TRUST FUNDS

In 1918 a law was enacted authorizing the Secretary of
[509] the Interior to withdraw tribal trust funds from the Treasury and deposit them at interest in banks in cases where the United States was not obligated by law to pay a higher rate of interest than the banks offered. The same law authorized the Secretary to invest the trust funds of any tribe or individual Indian in United States Government bonds. *See* sec. 28, act of May 25, 1918, c. 86, 40 Stat. 591. The text of the section follows:

> SEC. 28. That the Secretary of the Interior be, and he is hereby, authorized, under such rules and regulations as he may prescribe, to withdraw from the United States Treasury and segregate the common, or community funds of any Indian tribe which are, or may hereafter be, held in trust by the United States, and which are susceptible of segregation, so as to credit an equal share to each and every recognized member of the tribe except those whose pro rata shares have already been withdrawn under existing law, and to deposit the funds so segregated in banks to be selected by him, in the State or States in which the tribe is located, subject to withdrawal for payment to the individual owners or expenditure for their benefit under the regulations governing the use of other individual Indian moneys. The said Secretary is also authorized, under such rules and regulations as he may prescribe, to withdraw from the Treasury and deposit in banks in the State or States in which the tribe is located to the credit of the respective tribes, such common, or community, trust funds as are not

> susceptible of segregation as aforesaid, and on which the United States is not obligated by law to pay interest at higher rates than can be procured from the banks: *Provided,* That no tribal or individual Indian money shall be deposited in any bank until the bank shall have agreed to pay interest thereon at a reasonable rate and shall have furnished an acceptable bond or collateral security therefor, and United States bonds may be furnished as collateral security for either tribal or individual funds so deposited, in lieu of surety bonds: *Provided further,* That the Secretary of the Interior, if he deems it advisable and for the best interest of the Indians, may invest the trust funds of any tribe or individual Indian in United States Government bonds: *And provided further,* That any part of tribal funds required for support of schools or pay of tribal
> [510] officers shall be excepted from segregation or deposit as herein authorized and the same shall be expended for the purposes aforesaid: *Provided, however,* That the funds of any tribe shall not be segregated until the final rolls of said tribe are complete: *And provided further,* That the foregoing shall not apply to the funds of the Five Civilized Tribes, or the Osage Tribe of Indians, in the State of Oklahoma, but the funds of such tribes and individual members thereof shall be deposited in the banks of Oklahoma or in the United States Treasury and may be secured by the deposit of United States bonds.

The 1918 act enlarged the discretion of the Secretary of the Interior as to the manner in which he might make the trust funds productive. Prior to 1918 he could either invest in Government bonds, under authority of the 1841 act, or, with the limited classes of funds to which the 1880 act and the General Allotment Act applied, deposit

them in the treasury at interest. Now he was given the additional alternative of depositing the funds in banks.[48]

To keep Indian trust funds in non-interest-bearing treasury accounts was not one of the alternatives the 1918 act gave the Secretary.

[511] First, discretion vested in the Secretary of the Interior, great as it may be, is confined to the limits of reason. *Tooahnippah v. Hickel,* 397 U.S. 598 (1970); *Arenas v. United States,* 322 U.S. 419 (1944); *United States v. Laughlin,* 249 U.S. 440 (1919). Leaving trust funds idle when they could readily be invested is so harmful to the beneficiary and incompatible with the basic concept of trust responsibility as to lie beyond the bounds of legal discretion. As the Supreme Court stated in the *Intermountain Rate Cases,* 234 U.S. 476, 491 (1914):

> . . . an investiture of a public body with discretion does not imply the right to abuse but on the contrary carries with it as a necessary incident the command that the limits of a sound discretion not be transcended . . .

Second, the 1918 act did not repeal the 1841 act. The mandate of the earlier statute to make all funds held in trust by the United States productive was not superseded.

[48]At oral argument, the defendant's counsel mistakenly contended that the 1918 act requires segregation of tribal funds before they can be deposited in banks or invested in bonds. The statute shows on its face that segregation, deposit in banks, and purchase of U.S. bonds are alternatives. None is a prerequisite to another. *Also see* S. Rept. 272, 65th Cong., 2d Sess. 25 (1918) (B-47). A later Secretary of the Interior, urging passage of legislation to authorize the payment of interest on idle Indian funds in the treasury, stated only that it "had proved impractical" to deposit the funds at interest or buy bonds with them, not that he was prevented from doing so because the individual Indians' shares were not yet segregated. *See* letter of Roy O. West to Senator Lynn J. Frazier, Chairman, Committee on Indian Affairs, January 3, 1929, in S. Rept. 1396, 70th Cong., 2d Sess. (1929) (B-61), quoted in part below in this opinion.

The whole thrust of the 1918 legislation was to increase productivity, not to legalize idleness.

Senator Charles Curtis was the author of section 28 of the Act of May 25, 1918. He explained the purpose of the investment provisions as follows during the debate on March 23, 1918 (56 Cong. Rec. 3966) (B-48):

[512] > . . . There is $11,000,000 of Indian funds in the Treasury of the United States to-day not drawing a cent of interest. This item was prepared by me, and agreed to by the committee, so that the Indian office could place this money in banks or, if the Commissioner of Indian Affairs saw fit and thought it was for the best interest, he might buy liberty bonds with the $11,000,000. In addition to the $11,000,000 belonging to tribes that draws no interest there is some thirty-odd million dollars of individual funds drawing less interest than 4 per cent, and the item was put in allowing the commissioner, if he thought best, to invest either of these funds in liberty bonds.

Senator Curtis was even more explicit in committee, when he first proposed the amendment (Hearings on H. R. 8696 Before the Senate Committee on Indian Affairs, 65th Cong., 2d Sess. 176 (1918–B-46)):

> . . . A showing was made before this committee at the last session of Congress that there were $11,000,000 in the Treasury of the United States belonging to the tribes, upon which not one cent of interest was paid. A showing was made that one tribe had to its credit $600,000, and that no interest was being drawn, while members of that tribe were in a starving condition. This amendment that I offer is to correct that situation . . .

* * * * * * *

Surely this committee will not let another year go by where we will have these Indians with $11,000,000 on deposit without drawing a cent of interest. Surely this committee will not let another year go by while Indians suffer at the same time that they have money in the Treasury of the United States that is not drawing interest.

To legalize the existing practice of holding certain Indian trust funds idle was clearly the last thing Congress intended by the 1918 act.

[513] Senator Curtis's figure of $11,000,000 in idle trust funds comes from the testimony of Assistant Commissioner of Indian Affairs Edgar B. Meritt on February 16, 1917, at page 46 of Hearings on S. 8272 before the Senate Committee on Indian Affairs, 64th Cong., 2d Sess. (1917–B-43). Mr. Meritt's testimony necessarily was based on treasury balances, either the closing balances for fiscal year 1916, which were the latest published, or more recent unpublished figures. Opening and closing balances in the Indian trust fund principal accounts for fiscal year 1917 were as follows. *See Combined Statement of the Receipts and Disbursements, Balances, etc. of the United States During the Fiscal Year Ended June 30, 1917* at 140-142 (the 1917 opening balances are the same as the 1916 closing balances):

July 1, 1916		*June 30, 1917*
$ 7,704,883.32	Indian Moneys, Proceeds of Labor	$ 7,651,660.73
3,819,636.75	Other non-interest-bearing accounts	3,645,226.00
$11,524,520.07	Subtotal, non-interest-bearing accounts	$11,296,886.73
33,211,790.38	Interest bearing accounts	29,961,356.05
$44,736,310.45	Grand total, trust fund principal accounts	$41,258,242.78

There can be no doubt, therefore, that the IMPL was one of the "trust funds" which the 1918 act authorized to be withdrawn from the treasury and deposited in banks or invested in Government bonds. Without including it in the total, the non-interest-bearing trust funds come nowhere near the total which was reported to the Senate by the legislation's sponsor.

[514] The Comptroller General ruled that interest on tribal money deposited in a bank under authority of the 1918 act should become a part of the principal amount on deposit, i.e., should be compounded, rather than put back in the IMPL fund. *See* letter to Secretary of the Interior, February 11, 1926, quoted in H. Rept. 897, 69th Cong., 1st Sess. (B-57.)

We have discovered no good reason for the continuing failure of the Interior Department and Bureau of Indian Affairs to invest the IMPL fund after the reminder given them by the 1918 act. Secretary West's statement (*supra*,

note 48) that investment was impractical "because of the small amount of money in many of the accounts; [and] the fact that in a great many instances the funds are needed for current expenses" is unconvincing. The IMPL was a common trust fund from its inception. Ease and speed of investment, the opportunity to invest small balances, and the economy and speed of sale when one participating trust desires to sell and another wishes to increase its holding in the fund are among the special advantages of common trust funds. G. Bogert, *Trusts and Trustees,* §677 (2d ed., 1960).

The Act of September 11, 1841 (31 U.S.C. §547a) is not mentioned in any of the legislative history of the 1918 act brought to our attention. It was probably unknown to the Indian Office and the Congress in 1918, since this was during its period as a "lost law".

The 1883 act and the 1887 act were amended by the
[515] Act of May 17, 1926, c. 309, 44 Stat. 560.[49] The

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[49] The following is the text of the act:

> CHAP. 309—An Act To authorize the deposit and expenditure of various revenues of the Indian Service as Indian moneys, proceeds of labor.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That hereafter all miscellaneous revenues derived from Indian reservations, agencies, and schools, which are not required by existing law to be otherwise disposed of, shall be covered into the Treasury of the United States under the caption "Indian moneys, proceeds of labor," and are hereby made available for expenditure, in the discretion of the Secretary of the Interior, for the benefit of the Indian tribes, agencies, and schools on whose behalf they are collected, subject, however, to the limitations as to tribal funds, imposed by section 27 of the Act of May 18, 1916 (Thirty-ninth Statutes at Large, page 159).

[Footnote continued]

[516] amendatory act was requested by the Secretary of the Interior for the following reason, stated in his letter of April 6, 1926, to the Chairman of the House Committee on Indian Affairs (*see* H. Rept. 897, 69th Cong., 1st Sess. (1926) (B-57)):

> The Comptroller General of the United States has recently held that the only revenues which legally

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> SEC. 2. The Act of March 3, 1883 (Twenty-second Statutes at Large, page 590), and the Act of March 2, 1887 (Twenty-fourth Statutes at Large, page 463), are hereby amended in accordance with the foregoing.

The intent of the 1926 act was probably only to modify the 1883 and 1887 acts and not to supersede them with the quoted language. Evidence of this limited intent is furnished by the Act of May 29, 1928, c. 901, §1(68), 45 Stat. 991, which expressly repealed the 1887 act's requirement for annual reports on expenditures from the IMPL fund, although the requirement had not been carried forward into the 1926 act.

The editors of the United States Code consider that the 1883 exemption relating to the Five Civilized Tribes is still in force. The following composite version of the 1883, 1887, and 1926 acts appears in Title 25 of the Code (1970 ed.):

> §155. Disposal of miscellaneous revenues from Indian reservations, etc.
>
> All miscellaneous revenues derived from Indian reservations, agencies, and schools, except those of the Five Civilized Tribes and not the result of the labor of any member of such tribe, which are not required by existing law to be otherwise disposed of, shall be covered into the Treasury of the United States under the caption "Indian moneys, proceeds of labor", and are made available for expenditure, in the discretion of the Secretary of the Interior, for the benefit of the Indian tribes, agencies, and schools on whose behalf they are collected, subject, however, to the limitations as to tribal funds, imposed by sections 123 and 142 of this title. (Mar. 3, 1883, ch. 141, §1, 22 Stat. 590; Mar. 2, 1887, ch. 320, 24 Stat. 463; May 17, 1926, ch. 309, §1, 44 Stat. 560; May 29, 1928, ch. 901, §1, 45 Stat. 991.)

may be covered into the Treasury and expended as Indian moneys, proceeds of labor, are those specifically mentioned in the act of 1883, viz., "proceeds of all pasturage and sales of timber, coal, or other products of any Indian reservation," but that the long established practice of depositing and using moneys derived from the other sources mentioned will not be disturbed until July 1, 1926, in order that an opportunity may be afforded for procuring remedial legislation, it having been represented to him that obligations had been incurred against the anticipated revenues for the current fiscal year and that to forbid the use thereof at this time would seriously handicap the business of the Indian Office.

Such revenues have been relied upon for a good many years to meet a very material part of the necessary expenses connected with the support, civilization, and education of Indians. These moneys do not belong to the United States, and if there is no authority to expend them after July 1, 1926, larger appropriations by Congress will be absolutely essential unless the efforts of the department in behalf of the Indians are to be materially curtailed.

Presenting the remedial bill to the Senate on May 10, 1926, the Chairman of the Indian Affairs Committee, John William Harreld of Oklahoma, stated (67 Cong. Rec. 9077);

> ... This bill is simply to authorize them [Department of the Interior] to do just what they have been doing—to place those miscellaneous collections to the credit of any particular tribe under the head of "Indian moneys, proceeds of labor," and then to spend the money for the benefit of that particular tribe. It is what they have been doing since 1883, as I say; but because of objections made by the Comptroller General they need this legislation to settle the difficulty.

The amendatory act of 1926 had nothing to do with investment, and did not affect the applicability of either the 1841 act or the 1918 act to the IMPL fund.

[517] The Senate debate on the 1926 act illustrates the ignorance of Congress during that period of the IMPL fund, the law governing it, its actual administration, and its size, as witness the following colloquy *(ibid.)*:

> Mr. LENROOT. Mr. President, I should like to ask the Senator what becomes of these miscellaneous revenues now. Where do they go?
>
> Mr. HARRELD. It seems that they carry an account of this sort with each tribe separately, and these miscellaneous collections are credited to that account; and they have for years been paying that out for the benefit of the tribe in a way authorized by Congress, I presume, or perhaps it was a small amount and was paid out on their own initiative. I am not sure about that.
>
> Mr. LENROOT. Is there not any law that now requires the disposition of those revenues?
>
> Mr. HARRELD. They have never thought there was any need for a law. These are only small amounts, just the odds and ends of collections on behalf of the tribe.
>
> Mr. LENROOT. I supposed that we had some law that required some disposition of all revenues received from every source; and if there is such a law, this bill in its present form would not accomplish it.
>
> Mr. HARRELD. I do not know about the form of it. I introduced the bill just in the form in which they asked me to introduce it.

Ignorance of the 1841 act is further evidenced by the request for legislation made by the Secretary of the Interior on January 3, 1929, *supra*, note 48). In this letter the Secretary wrote:

> . . . As shown by the accompanying statement the Government is holding a large amount of money belonging to various tribes of Indians throughout the United States, no part of which is drawing any interest and it is felt by this department that the
> [518] Government, as guardian of the Indians, is not doing full justice to its wards by holding and using this money without compensation to them. It is conceded that there is no legal obligation to pay interest on these funds, but the fact that the Government has obligated itself to pay interest on other funds of similar origin would appear to constitute a moral obligation which is now only partially fulfilled.

This was written during the period when the 1841 act was omitted completely from the United States Code. The implication under §2(5) of the Indian Claims Commission Act (25 U.S.C. 70a (5)) of the Secretary's acknowledgment of a moral obligation deserves emphasis.

The result of the Secretary's letter was the act of February 12, 1929, c. 482, 45 Stat. 1164, 25 U.S.C. §161a, which read as follows:

> . . . all money in excess of $500 held by the United States in a trust fund account, and carried on the books of the Treasury Department to the credit of an Indian tribe, if the payment of interest thereon is not otherwise authorized by law, shall bear simple interest at the rate of 4 per centum per annum from the date of the passage of this Act . . .

Although it clearly appears to us that the Secretary and the Congress intended the 1929 act to apply to the IMPL fund,[50] the Comptroller General on May 31, 1929, ruled that it did not, because the IMPL was not "carried on the books of the Treasury Department to the credit of an Indian tribe." Decision A-27308, 8 Comp. Gen. 625 (1929–B-64). It was, as stated above, carried as a single common trust fund at the Treasury, and identified as to tribes only on the books of the Indian Office.

[519] Congress passed corrective legislation the next year. *See* Act of June 13, 1930, c. 483, 46 Stat. 584, 25 U.S.C. §§161b-161d.

Prior to the 1930 legislation, the 1929 act of its own force started the payment of interest on a number of funds in the treasury upon which interest was not previously being paid. These funds consisted largely of proceeds of judgments of the Court of Claims and proceeds of lands sold under certain post-1880 statutes which contained no explicit provision for payment of interest.

By the Act of June 24, 1938, c. 648, 52 Stat. 1037, 25 U.S.C. §162a, the investment provisions of the 1918 act were superseded by more flexible authority for deposit of tribal funds in banks or investment in public-debt obligations of the United States or other securities unconditionally guaranteed as to both principal and interest by the United States.

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[50]H.R. Rept. 1272, 71st Cong., 2d Sess., to accompany H.R. 11782, which became the 1930 act discussed below, states, "The law as it now stands [i.e., the 1929 act] was originated primarily with the idea of authorizing the payment of interest on these funds." *See* B-65.

VII. THE INTEREST RATE

Logically, the plaintiffs should be awarded the amount they would have received if their trust moneys, and the interest accruing thereon, had been invested according to law during the period the defendant held them idle. It would be a hopeless undertaking, however, to attempt
[520] reconstruction of the investment programs of the many individuals who served as Secretary of the Interior during that period, especially after 1918, when they had discretion to choose between different kinds of investments. In such circumstances courts usually fix the recovery by awarding interest which approximates the expected yields. G. Bogert, *Trusts and Trustees,* §702 at 409.[51]

In *Peoria Tribe v. United States,*[52] on remand from the Supreme Court,[53] the parties agreed that interest should be the measure of damages for the Government's failure to invest a trust fund.

Five percent was used in *Peoria.* This figure agrees with the minimum rate prescribed in the act of 1841 (31 U.S.C. §547a) and with the rate we established for Indian just compensation cases in *Three Affiliated Tribes of the Fort Berthold Reservation v. United States,* Docket 350-F, 28 Ind. Cl. Comm. 264 (1972). Five percent was a traditional figure in the Government's
[521] financial dealings with the Indians during the period

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[51] In this connection we think it irrelevant to what extent the Government may have used the Indians' money which it held in its treasury without payment of interest. The mandate of the Indian Claims Commission is to compensate the Indians, not to punish the Government. *Cf.* G. Bogert, Trusts and Trustees, §701 at 406.

[52] Docket 65, 20 Ind. Cl. Comm. 62 (1968).

[53] 390 U.S. 468 (1968).

ending in 1934. *Id.* at 301; *Alcea Band of Tillamooks v. United States,* 115 Ct. Cl. 463, 518, 87 F. Supp. 938 (1950), *rev'd on other grounds,* 341 U.S. 41 (1951); *see also Uintah and White River Bands of Ute Indians v. United States,* 139 Ct. Cl. 1, 11-12, 152 F. Supp. 953 (1957); *Rogue River Tribe v. United States,* 116 Ct. Cl. 454, 89 F. Supp. 798 (1950), *cert. denied,* 341 U.S. 902 (1951).

In *Fort Berthold* we rejected a suggestion that we adopt the legal interest rate of the state where the property was located, writing as follows (28 Ind. Cl. Comm. at 279):

> . . . We deem it more proper that a single, national, uniform standard for Indian claims be adopted, reflective of the unique and exclusive relationship of the Federal Government and the Indian claimants.

We also rejected the suggestion that varying rates be used for different periods in accordance with the historical fluctuations of the money market. In this connection we stated (at page 300):

> The Commission does not find merit in the idea that the just compensation rate should be subject to such recalculation every 20 years, although we recognize that the greatest accuracy would be achieved by calculating a new rate for every year. For this type of judicial determination, however, there is an advantage of stability and convenience over extreme accuracy. Over the whole period 1943-1971 inclusive, calculations as above show the comparative just compensation rate to be 5.4 percent. It appears that in the long term 5 percent is a rate that conveniently averages the ups and downs of economic activity.

A uniform interest rate, applicable across the board except where otherwise required by positive law, is particularly desirable in accounting cases.

[522] If the Commission should adopt several rates applicable to different funds or periods, the plaintiffs would in effect be challenged to try and fit their claims into the highest category and the defendant to keep them in the lowest. The matter of interest rates would thus be litigable in every case, and much of the advantage of choosing interest over actual lost income as the measure of damages would be destroyed.

Our accounting cases have already been long delayed. In times of inflation, all delay is unjust to the plaintiff whose claim is valid, since we have no jurisdiction to compensate for the fall in value of the dollar. *Nooksack Tribe v. United States,* 162 Ct. Cl. 712 (1963), *cert. denied,* 375 U.S. 993 (1964). Interest, awarded in trust cases as a substitute for the income the plaintiff should have received long ago, is not intended to, and does not, compensate for the effects of inflation. Thus, when we have legal discretion to choose between alternative rules for calculating damages, we are impelled toward that one which can be applied with the least delay.

We believe the 5 percent rate applied to the failure to invest in *Peoria* should be used here too.

An additional weighty factor which impels us to use the uniform 5 percent rate in trust cases is that these are claims in equity. *Restatement (Second) of Trusts* §§197, 198 (1959). When we adjuducate such claims we sit as a court of conscience. Indian Claims Commission Act §2(1), 26 U.S.C. §70a (1); *Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co.,* 324 U.S. 806 (1945); *Deweese v. Reinhard,* 165

[523] U.S. 386 (1897); *Wilson v. Wall,* 73 U.S. (6 Wall.) 83, 90 (1867). In *Fort Berthold, supra,* we decided that 5 percent interest is required for just compensation. It would shock our conscience, absent a statute or treaty so requiring, to award damages for breach of a fiduciary duty at a rate which provides less than just compensation. The circumstances here urge equity to follow the law and apply the same 5 percent rate.

In summary, we believe Congressional policy expressed in the 1841 act, tradition, practicality of application, the need to avoid unnecessary delay, and good conscience require us to adhere to a uniform 5 percent interest rate to measure damages for failure to make trust funds productive in all cases where a different rate is not prescribed by positive law.

VIII. THE MEASURE OF DAMAGES FOR FAILURE TO INVEST THE IMPL FUND

Measuring the damages for failure to invest an actual fund that had frequent deposits and withdrawals is no simple matter. The case of the IMPL fund is further complicated by the requirement of the 1841 act for investment of "the annual interest accruing thereon". Determining the appropriate interest rate, as we have done above, is only the first step.

The instant case thus differs markedly from the *Peoria* situation (*supra,* notes 52 and 53), which involved only the Government's failure to place a definite sum in an account bearing simple interest.

During the entire period from 1883 to 1930, when the IMPL fund did not bear interest, the United States managed it as a common trust fund. The 1841 act applied to "funds held in trust by the United States" and not to

undivided shares in such funds. The IMPL fund, therefore, should have been invested as an entity, without regard to the various tribes' respective shares.

[524] Periodically the aggregate of accessions to the fund, consisting of the revenues coming in from the reservations to Washington and any annual interest payments that might have been received from prior investments, ought to have been used to buy Government bonds, to the extent that these accessions exceeded disbursements. We believe this should have been done not less often than once a month. *Cf. Menominee Tribe v. United States,* 107 Ct. Cl. 23 (1946). In months when disbursements exceeded accessions, the officers administering the trust would, of course, have sold rather than bought bonds.

To accord with our determination of the appropriate interest rate, it must be assumed that all bonds were purchased at par and yielded 5 percent interest per year. To accord with the 1841 act's requirement for reinvestment of "annual interest", it must be further assumed that the bonds paid interest only once a year.

Administered, as it ought to have been, under such a program, the IMPL fund would have grown, but, except during the period between 1883 and 1887, not in the uncomplicated geometric progression of money left on deposit in a savings account at compound interest. During the 1883 to 1887 period no withdrawals were authorized, and all accruing interest should have been reinvested.

The plaintiffs' damages are measured by the loss of growth of their respective shares in the funds, due to the fact that the fund was not actually invested.

[525] On July 1, 1930, the date the common trust fund was broken up into separate tribal accounts, pursuant to the

Act of June 13, 1930, 25 U.S.C. §161b, each tribe's share would have been of greater value than it actually was if the fund had previously been invested according to law. The difference between the actual value of such share and the value to which it would have grown if invested represents an element of damage which became fixed on July 1, 1930. But it also represents a shortage in the amount that ought to have been placed in each tribe's separate 4 percent account created on that date. Due to such shortage each plaintiff has lost interest ever since 1930. The plaintiffs are entitled to additional damages equal to the lost interest, that is, in the amount of 4 percent per annum from July 1, 1930, until the date of payment, on the shortages in their respective separate accounts.[54]

[526] We hold that the damages in these cases are to be determined by calculating what each tribe would have had on deposit on June 30, 1930, if, on the occasions its

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[54]The separate accounts are termed by the Interior and Treasury Departments "Proceeds of Labor" (followed by the name of the tribe), the words "Indian Moneys" no longer being used. The separate accounts of the plaintiffs herein, for example, are entitled, respectively, "Proceeds of Labor, Western Shoshone Indians, Nevada", and "Proceeds of Labor, Mescalero Indians, New Mexico".

Interest is not credited back to the account on which earned, as it would be in a savings bank, but is deposited to an additional, non-interest-bearing account named "Interest on Proceeds of Labor" (followed by the name of the tribe).

The question of whether the defendant was under a duty to make the money in the interest accounts productive is not before the Commission in these cases. While the plaintiffs' brief, which is applicable to several other cases as well as the instant ones (*see* note 1), argues that the defendant was under a duty to invest the money in the interest accounts, neither of the present plaintiffs raised the issue by appropriate exception.

moneys were put into and taken out of the IMPL fund, they had instead been deposited or withdrawn from a passbook savings account paying 5 percent interest once a year. As customary with such accounts, the interest payments should be treated simply as deposits. Disallowed expenditures should be treated as if they had never been withdrawn.

The difference between the amount so computed and the amount actually placed in the tribe's separate "Proceeds of Labor" account on July 1, 1930, is that tribe's basic damages. It consists of the aggregate of the lost interest and the disallowed expenditures.

On the basic damages so computed, the plaintiffs are entitled, pursuant to the 1930 act, to simple interest from July 1, 1930, until payment of the final judgment of this Commission, at the rate of 4 percent per annum. Part of this interest—that due on the principal sums of the disallowed expenditures—has already been awarded in Docket 326-A by our 1970 decision. Damages computed as we have just stated will include this previously awarded interest and will not be in addition to it.

[527] In awarding damages equal to compound interest upon the entire IMPL fund for the period between 1883 and 1887 and upon sums unlawfully expended from the fund for the period ending June 30, 1930, we have not overlooked the numerous cases refusing compound interest against the United States.[55] In all of these cases

[55]For example: *Peoria Tribe v. United States,* 390 U.S. 468 (1968); *United States v. Isthmian Steamship Co.,* 359 U.S. 314 (1959); *Cherokee Nation v. United States,* 270 U.S. 476 (1926); *Menominee Tribe v. United States,* 97 Ct. Cl. 158 (1942); *Choctaw Nation v. United States,* 91 Ct. Cl. 320 (1940); *cert. denied,* 312 U.S. 695 (1941); *Ute Indians v. United States,* 45 Ct. Cl. 440 (1910).

which we have read, except one, the courts seem totally unaware of the 1841 act. What these cases hold is that compound interest, indeed any interest, cannot be assessed against the Government in the absence of statutory or constitutional authority. We have such authority here, in the 1841 act and in the Indian Claims Commission Act.

To be more precise, we have the authority, and duty, to award damages for breach of the 1841 act, which damages are measured by interest. The Supreme Court pointed out the subtle distinction between interest as such and damages measured by interest in its most recent case denying compound interest. *Peoria Tribe v. United States,* 390 U.S. 468 (1968).

In *Peoria,* this Commission had awarded $172,726 in damages against the United States for selling plaintiff's lands at private sale rather than at public auction as
[528] required by treaty. We denied the plaintiff's claim for interest on the $172,726, although the treaty provided for investment of the proceeds of the land sales. *See* Docket 65, 15 Ind. Cl. Comm. 123, 156 (1965).

The Court of Claims affirmed in a 3-2 decision, 177 Ct. Cl. 762, 369 F.2d 1001 (1966). On certiorari, the Supreme Court reversed, stating (390 U.S. at 470-471):

> . . . this is not a case where the Court is asked to exercise "the power to award interest against the United States" . . . The issue, rather, concerns the measure of damages for the treaty's violation in the light of the Government's obligations under that treaty.

The Government's obligations, the court held, included that of investing the $172,726, and it was liable in damages for not doing so.

The court did not require that such damages take the form of interest, but left how to measure them up to this Commission on remand. In footnote 6 on page 473, the court stated as follows:

> The respondent did not brief or argue the question of how to measure these damages . . .
>
> Because the United States is not liable for interest on judgments in the absence of an express consent thereto, it cannot be liable for interest on the annual income payments not made. Therefore, if an interest rate measure is adopted by the Commission, it must be simple and not compound interest.

The 1841 act does not appear to have been brought to the court's attention. Necessarily the court did not decide whether that act applied to the Peoria fund. The
[529] governing treaty provided that the interest on the fund was to be annually paid over to the Indians or expended for their benefit. This provision is inconsistent with the 1841 act's direction that accruing interest be reinvested. *Peoria* is therefore distinguishable from the instant case, falling within the exception "when not otherwise required by treaty".

The instant case cannot fall within that exception, for the statutes governing the IMPL fund contain nothing inconsistent with reinvestment of income. Thus the measure of damages must include not only compensation for the failure to produce simple interest, but also for the failure to reinvest so much of it as was not lawfully expended. We are not here awarding interest on a judgment for simple interest, but including an additional factor in our judgment to make up for the income which should have been, but was not, earned on reinvested interest.

The only practical way we can think of to assess damages for failure to comply with the law requiring investment and reinvestment of the income is by awarding compound interest. The *Peoria* decision of the Supreme Court is no authority to the contrary.

The only case denying compound interest against the Government which we have discovered where the 1841 act was cited is *Cherokee Nation v. United States,* 270 U.S. 476 (1926). The court held the act inapplicable, because the Government and the Cherokees had entered into subsequent agreements for simple interest.

[530] The defendant advanced another argument against compound interest in *Cherokee*—that it would result in an excessive recovery. The plaintiff asked compound interest for 88 years upon $1,111,284.70. The Supreme Court said (270 U.S. at 492):

> . . . This claim proves too much. It would require compound interest brought about by annual or semiannual rests for near a century, an amount that the Solicitor General suggests would be equal to the National debt.

The Solicitor General misled the court. The national debt in 1926 was $19,643,216,000.[56] Five percent interest on $1,111,284.70 compounded annually for 88 years would amount to $80,262,338, or about four-tenths of one percent of the 1926 national debt.

In any event, the proposition that a court should depart from the law because following it may result in the plaintiff's getting too much is an unworthy one, and was not the ground of decision in Cherokee Nation, *supra.* As Judge Davis wrote in dissent in *Peoria Tribe v. United States,* 177 Ct. Cl. 762, 775, 369 F.2d 1001 (1966):

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[56] U.S. Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1957, at 720 (1960).

It is irrelevant that an award of interest, pursuant to the 1854 treaty, could increase the award to plaintiff by five or six times. If the treaty so provides, we cannot refuse interest because the amount is relatively large.

If damages awarded under the Indian Claims Commission Act should approach the size of the national debt—which they never will—it would mean that the wrongs done to the Indians by the United States were
[531] correspondingly enormous. It would not constitute a wrong by the Indians against the Government.

We have found only four cases besides *Cherokee* where the reports mention the 1841 act.

The earliest is *United States,* ex rel. *Angarica v. Bayard,* 127 U.S. 251 (1888). Mr. Angarica was an American citizen whose claim for damages in the Cuban insurrection had been approved by the Spanish-American Claims Commission set up by executive agreement in 1871. Under this agreement, claims might be presented only through the United States Government, and awards were paid by the Spanish Government to the American Secretary of State for distribution to the successful claimants. Spain paid the amount of Angarica's award to the Secretary.

When he paid Angarica, the Secretary withheld 5 percent of the award as security for Spain's payment of the expenses of arbitration. Pursuant to the 1841 act, the Secretary invested the amount withheld in United States bonds, and reinvested the interest as it was received.

After a delay of several years, Spain paid the expenses of arbitration. Thereupon the Secretary paid Angarica the exact amount that had been originally withheld from his award, not paying over any of the accumulated interest.

Angarica's executrix sued for mandamus to compel payment of the interest.

The Secretary of State justified his refusal to pay over
[532] the interest as follows: Since the 1841 act "was silent as to the beneficiary by such a transaction, 'the sole competence of Congress, which prescribed the mode of investment, to direct the disposition of the proceeds, is beyond dispute'." 127 U.S. at 256.

The trial court refused the mandamus. *United States,* ex rel. *Angarica v. Bayard,* 15 Mackey 310 (D.C. Sup. Ct. 1885) (D-117). It stated:

> . . . the [1841 act] relates only to a class of trusts which cannot be interfered with or disposed of by executive power without further legislation, and this construction is supported by contemporaneous facts and other statutes. At the time of the enactment of 1841 there existed certain treaties with the Indians, containing stipulations for the payment to them annually of interest upon the proceeds of land ceded by them, and it had already been provided, by the act of January 9, 1837 (5 Stat. 135), which is now embodied in the Revised Statutes as section 2096 [25 U.S.C. §158], that these funds should be invested in securities at not less than five per cent interest. It was clearly for trusts of this definite character, established, as we have said, by law, that the act of 1841 proposed to establish a general system. This is especially indicated by the exception in that act of cases regulated by treaty. The reference is to these Indian treaty funds. We think, then, that the statute did not apply to the transaction in question, and it is evident that the executive did not propose to conform to its requirements.

The Supreme Court of the United States affirmed, as it stated, "in general terms". It did not rule on whether the 5 percent withheld from Angarica's award was a trust fund, or whether the 1841 act properly applied to it. Rather it held that there was no difference between a claim for interest actually received by the United States and a claim against the United States for interest. Both, it stated, were barred by "the well-settled principle, that
[533] the United States are not liable to pay interest on claims against them, in the absence of express statutory provision to that effect". 127 U.S. 260.

A later Supreme Court criticized the *Angarica* reasoning thus, in *Henkels v. Sutherland,* 271 U.S. 298, 302 (1926);

> . . . Without challenging the correctness of this view as applied to the precise facts of that case, it cannot be accepted as a rule of general application. Especially, it cannot be accepted as applicable here, where the property of a citizen has been mistakenly seized and, by executive authority, after conversion into money, has been invested in government securities. We cannot bring ourselves to agree that a direction to invest such money in securities of the United States, rather than in other securities may be utilized to enable the Government unjustly to enrich itself at the expense of its citizens, by appropriating income actually earned and received which morally and equitably belongs to them as plainly as though they had themselves made the investment.

The 1841 act was mentioned in passing in *United States v. Blackfeather,* 155 U.S. 180 (1894). Here the Court of Claims had allowed the Shawnee Indian Tribe interest upon a sum found due to it because the United States sold ceded tribal lands at private sale rather than public auction as required by treaty. *See* 128 Ct. Cl. 447

(1893). The treaty provided that the net sale proceeds should constitute a fund upon which the United States would pay 5 percent annually "as an annuity". In affirming, the Supreme Court stated (155 U.S. at 192):

> It is true it is called an annuity, but the amount of the annuity is measured by the interest paid upon funds held in trust by the United States, (Rev. Stat. §3659 [the 1841 act],) upon investments for Indians, (§2096 [the 1837 act],) as well as by the interest paid upon the affirmance by this court of judgments of the Court of Claims. (§1090.)

[534] The 1841 act's requirement for investment of accruing interest was not mentioned. As in *Peoria, supra,* the treaty provision for annual payment is incompatible with reinvestment.

The only other judicial citations of the 1841 act we have found are in two Court of Claims cases.

The earlier was *Ottawa and Chippewa Indians v. United States,* 42 Ct. Cl. 240 (1907). It involved a trust fund in the original principal sum of $20,000, which had been invested in bonds pursuant to the treaty of March 28, 1836, 7 Stat. 491. Proceeds of the investments were covered into the treasury as public moneys in 1885, under a disputed interpretation of a release clause in the treaty of July 31, 1855, 11 Stat. 624. The court stated (42 Ct. Cl. at 245):

> In 1885 these securities, from accrued interest and reinvestment, had accumulated to the amount of $62,496.40, but some time in that year they were covered into the Treasury of the United States.
>
> This action is brought by the claimants to recover the above amount and interest, under section 3659, Revised Statutes [the 1841 act], pursuant to an act

of Congress approved March 3, 1905, conferring jurisdiction upon this court for that purpose.

The court held that the $20,000 placed in trust under the 1836 treaty prior to 1855 was fully vested in the Indians so as not to be affected by the clause in the 1855 treaty releasing the defendant from all liability under former treaties.

[535] The Court of Claims gave the Indians judgment for the entire $62,496.40 to which the Ottawa and Chippewa fund had grown by 1885, plus interest at the rate of 5 percent per annum from that year. The Court did not discuss why it allowed interest upon the interest accumulated up to 1885, but, apparently, only simple interest thereafter.

The only remaining judicial citation of the 1841 act we have found is in the recent case of *Bonnar v. United States*, 194 Ct. Cl. 103, 438 F.2d 540 (1971). As in the *Henkels* case, quoted above, property of the plaintiff, an American citizen, had been mistakenly seized by the Alien Property Custodian. The court held the Government liable for the proceeds of its sale, but denied the plaintiff's claim for interest. The court distinguished *Henkels* on the ground that in the present case the proceeds had been deposited in the Federal treasury and no interest had accrued upon them while in *Henkels* they had been invested in Government bonds.

The plaintiff pointed out that a 1962 amendment to the Trading With the Enemy Act, 50 U.S.C. App. §9(a) (1964), expressly provided that the proceeds of sale would be held "in trust" by the Secretary of the Treasury. He expressly cited the 1841 act as requiring investment of all funds held in trust by the United States.

The Court of Claims disposed of the contention thus (194 Ct. Cl. at 163, 438 F.2d at 572-573):

> To this argument, we have two responses. First, §9(a) of the Act could have specifically referred to
> [536] 31 U.S.C. §547 (a), or required the Treasurer to invest the proceeds of any sale or liquidation. However, that section makes no such reference, and we regard this as a strong indication that Congress intended to limit recovery to the allocated sales proceeds. Second, and most importantly, this question was carefully considered in *Gmo. Niehaus & Co. v. United States* 179 Ct. Cl. 232, 373 F.2d 944 (1967), which was decided after the Act was amended in 1962, and it was answered adversely to plaintiffs' contentions.

Niehaus did not consider the 1841 act, but it did find a Congressional policy against awarding claimants of property erroneously seized and sold under the Trading With the Enemy Act any more than the net proceeds of the sale.

We believe this Congressional policy is the true basis of decision in *Bonnar.*

We do not believe that *Bonnar* is controlling here. While an amendment to the Trading With the Enemy Act passed in 1962 may well not incorporate without the specific reference a long-forgotten law enacted 121 years before, the same is not true of the amendment to the deficiency appropriation bill of 1883 which created the IMPL fund. In 1883, Congress was only 42 years away from 1841, and had cited and quoted the 1841 act only three years before, in the committee report on the bill which became the 1880 act. S. Rept. 186, 46th Cong., 2d Sess. (1880-B-36).

A stronger reason for not following *Bonnar*, however, is that the Indian Claims Commission Act embodies a far more liberal Congressional policy toward claimants than the Trading With the Enemy Act. Speaking of the Indian Claims Commission Act, the Court of Claims stated in *Oneida Tribe of Indians v. United States,* 165 Ct. Cl. 487, 492, *cert. denied,* 379 U.S. 946 (1964):

[537] Without that legislation, a justiciable claim might not be stated . . . But the Act has authorized recoveries on the basis of original Indian title . . . and there is no reason why a claim of the sort presented here could not come under the "fair and honorable dealings" provision (section 2(5))–at the minimum. If the Federal Government failed to treat fairly and honorably, in the circumstances, with the reservation timber, the defendant would be liable under the Act even though no conventional claim in law or equity was presented.

What the Court of Claims said above about the reservation timber applies as strongly to the miscellaneous reservation revenues which made up the IMPL fund. While our decision is based upon violation of a statute, the 1841 act, we believe it would have been unfair and dishonorable for the Government even in the absence of the statute unilaterally to seize the Indians' money, as it did, and deprive them of its use for extensive periods without making compensation.

It ought always to be remembered that the IMPL fund was made up of existing Indian moneys. The plaintiffs here are not making claim for moneys the defendant ought to have paid to them out of its treasury. They are claiming damages for their own moneys which the defendant admittedly took from them.

When the Government possessed itself of the tribal revenues and put them into a fund in Washington, it took away from the Indians something they already had. The Government's only moral justification for such action would be that it could manage the money better than the Indians. When, in fact, it did not manage the money at all, but only made it unavailable to the Indians, it did them a wrong as surely as if it had excluded them from
[538] their land. When it misspent a part of the IMPL fund, it wasted a part of the Indians' estate as surely as if it had destroyed part of their land.

Congress gave us no mandate to act as watchdog of the Treasury and seek pretexts for denying Indian claims on the basis of their size rather than their merits.

Thus, when in *Peoria Tribe v. United States,* Docket 65, 15 Ind. Cl. Comm. 123, 156 (1965), we invoked the familiar rule that interest against the United States cannot be awarded without express statutory authority, the Supreme Court reversed, stating (390 U.S. 468 at 472):

"Indian treaties 'are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them.' . . . '[T]hey are to be construed, so far as possible, in the sense in which the Indians understood them, and "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people."

Statutes as well as treaties are to be read in a spirit of generosity toward the Indians. *Alaska Pacific Fisheries v. United States,* 248 U.S. 78 (1918); *United States v. Nice,* 241 U.S. 591 (1916); *United States v. Celestine,* 215 U.S.

442 (1909). This is especially true of the interpretation of a sweepingly remedial statute such as the Indian Claims Commission Act. *Three Affiliated Tribes of the Fort Berthold Reservation v. United States*, 182 Ct. Cl. 543, 562, 390 F.2d 686 (1968), *aff'g in part, rev'g in part*, Docket 350-F, 16 Ind. Cl. Comm. 341 (1965); *Otoe and Missouria Tribe of Indians v. United States*, 131 Ct. Cl. 593, 131 F. Supp. 265, *cert. denied*, 350 U.S. 848 (1955) (*aff'g* Docket 11, 2 Ind. Cl. Comm. 355 (1953)).

[539] We therefore believe that we must read the 1841 act literally, follow the usual rule that it has prospective operation, and award damages for breach of its mandate to invest interest accruing on funds held in trust by the United States, where appropriate, as well as for breach of its mandate to invest the principal.

We are not confronted in these two cases with the question of whether the 1841 act's requirement for investment of accruing interest attaches to interest paid under the 1929 or 1930 act. We will address ourselves to this question whenever it is properly before us. *See* note 54, above.

The members of this Commission are not accountants and will not presume to specify the techniques which must be used to compute the damages as above described, unless the parties are unable to agree. In that event we will take expert testimony in an open hearing before issuing any decision.

We believe that the lawyers and accountants for the parties, conferring together in a spirit of professional good will, can best solve the technical problems occasioned by today's decisions.

We do not intend to rule out simplified accounting methods, so long as they produce results enough for

substantial justice. Indeed, we would prefer accounting to be finished promptly rather than to be unnecessarily refined.

Since the General Services Administration tribal accounting section is just now being restaffed, this is a particularly opportune time to determine what additional financial information may be essential, or helpful, to solve the problems of calculating interest and other technical accounting problems.

[540] The parties and their accountants will be ordered to confer within 30 days from the date of this opinion to discuss the question of what information should be supplied, and in what form. They will be further ordered to file with the Commission, within 45 days of the date of this opinion, a joint statement summarizing their discussions and stating what was agreed upon and what, if anything, remains in disagreement. The parties may accompany their joint statement with appropriate motions to obtain our rulings on the matters in disagreement or any other orders which they contend would assist in moving these cases on to final adjudication at an early date.

The periods for conferring and submitting a joint statement will not be extended on account of any motion for rehearing that may be filed herein.

IX. INTEREST ON SHORTAGES IN PAYMENTS UNDER TREATIES

In our 1970 opinion in *Te-Moak*, 23 Ind. Cl. Comm. at 70-74, we tentatively found a shortage of $16,392.76 in fulfillment of the defendant's obligation under the Treaty of October 1, 1863, 18 Stat. 689. The plaintiff claimed interest on parts of this sum. We deferred decision,

requesting the parties to "elaborate on their contentions on this issue, particularly concerning the basis for classifying moneys appropriated to satisfy treaty obligations as trust funds".

The only word on this matter we can find in any party's brief is the bare assertion, at page 37 of the plaintiffs', that unexpended portions of annuities and installment payments constitute funds held in trust by the United States.

[541] The cases indicate that shortages in payments required by treaty are ordinarily regarded as breaches of contractual obligation rather than as breaches of trust. It appears immaterial whether the shortage occurred because Congress failed to appropriate the money, because the money was diverted after appropriation, or because the money, although appropriated, was just not expended. *United States v. Omaha Indians,* 253 U.S. 275 (1920), *aff'g in part, rev'g in part,* 53 Ct. Cl. 549 (1918); *Confederated Salish and Kootenai Tribes v. United States,* 175 Ct. Cl. 451, *cert. denied,* 385 U.S. 921 (1966); *Rogue River Tribe v. United States,* 105 Ct. Cl. 495, 552-553, 64 F. Supp. 339, 344 (1946); *Choctaw Nation v. United States,* 91 Ct. Cl. 320, 402 (1940), *cert. denied,* 312 U.S. 695 (1941).

The Comptroller General of the United States had occasion to distinguish (1) Indian trust funds from (2) unexpended appropriations for Indian purposes, following adoption of the Act of February 12, 1929, c. 178, 45 Stat. 1164, as amended, 25 U.S.C. §161a. This statute provided for the payment of interest on "all money in excess of $500 held by the United States in a trust fund account. . .". Reviewing a long list of existing treasury accounts, the Comptroller General wrote in Decision A-27308 of September 30, 1929, at pages 5-7:

Under the heading "fulfilling Treaties with", *supra,* there are listed a number of items which, from the information and data available, do not appear to be trust fund accounts within the meaning of the said act of February 12, 1929 . . . the items under this heading are appropriations for particular objects contemplated by treaties with the respective tribes; and while they may be considered and carried on the books, as has been done heretofore, as
[542] no-year appropriations to carry out the purposes for which made, there appears to be no authority of law to consider them as trust fund accounts upon which interest should be allowed under the act here under consideration.

. . . .

Trust fund accounts, as distinguished from appropriations made for certain expenditures, are those made up of funds collected by the Government for or on behalf of the Indians and authorized by law to be placed in the Treasury to the credit of said Indians for whose benefit they were collected, or of appropriated funds which the law specifically provides shall be placed in the Treasury as a trust fund for the Indian tribe involved. When the appropriation merely provides for expenditures, or for the doing of certain things for the Indians, as in the case of ordinary appropriations, it is not a trust fund account upon which interest as provided by the act of February 12, 1929, should be allowed.

The plaintiffs have given us no reason to reexamine the law upon this point.

X. DEFENDANT'S PENDING MOTIONS IN DOCKET 326-A

On March 6, 1973, while the foregoing opinion was in preparation, the defendant filed a motion to require the plaintiff Te-Moak Bands to file a more definite statement of continuing wrongdoings requiring an accounting beyond June 30, 1951. The latter date is the one to which the defendant's previously filed accounting report extends.

In our opinion in this case of April 29, 1970, 23 Ind. Cl. Comm. 70, 72, we stated generally that the defendant would be required to furnish an up-to-date accounting of all wrongs that originated prior to August 13, 1946, and continued past that date. In subsequent cases, however, we have required the wrongdoing to be defined before we would order accounting brought down to date. *See*
[543] *Papago Tribe v. United States,* Docket 102, 26 Ind. Cl. Comm. 365 (1971); *Kiowa, Comanche, and Apache Tribes v. United States,* Docket 259-A, 24 Ind. Cl. Comm. 393, 397 (1971); *Fort Peck Indians v. United States,* Docket 184, 28 Ind. Cl. Comm. 171, 175 (1972). Accordingly, our order of April 29, 1970, is vacated insofar as it requires the defendant generally to furnish an up-to-date accounting. *See Shoshone-Bannock Tribes of the Fort Hall Reservation, Idaho v. United States,* Docket 326-C, order dated July 11, 1973.

We are ordering the parties in the instant case to confer, with their accountants, and report to the Commission what additional financial information may be essential or helpful to comply with today's rulings. We have ordered the parties to file a joint statement summarizing their discussions and stating what was agreed upon and what, if anything, remains in

disagreement. They may accompany their joint statement with appropriate motions to obtain further rulings on the matters in disagreement or any other orders which they contend would assist in moving these cases on to final adjudication at an early date.

In view of the foregoing we think it would serve no useful purpose to rule on the merits of the pending motion to require the plaintiffs to file a more definite statement of continuing wrongdoings requiring an accounting beyond June 30, 1951. Accordingly, the motion will be denied without prejudice, in order to clear it from the record and enable the defendnt to go to conference unencumbered by a prior position which may no longer be relevant to the actual state of the case.

[544] On April 11, 1973, the defendant filed another motion, this one to dismiss for lack of jurisdiction all claims accruing after August 13, 1946.

The Commission has asserted jurisdiction over continuing wrongs that started prior to August 13, 1946, on the ground that they "accrued" before that cutoff date. Insofar as the motion seeks to have us reconsider our jurisdiction to award damages on such claims for the post-cutoff period, it will be denied. *See Gila River Pima-Maricopa Indian Community v. United States,* 157 Ct. Cl. 941 (1962).

/s/Brantley Blue
Brantley Blue, Commissioner

I concur:

/s/Margaret H. Pierce
Margaret H. Pierce, Commissioner

Commissioner Vance concurs specially.

[545] Vance, Commissioner, concurring:

I fully concur in the opinion of the Commission, and add the following comments.

The dissent is in error in implying that the majority upholds the proposition that the United States, acting in a fiduciary capacity with respect to Indian trust funds, is subject to the same duties and obligations as a private trustee.

The Commission's opinion, while affirming that the Government is held to the most exacting fiduciary standard, declares that there are substantial differences between trusts administered by the United States and private trusts.

Such differences necessarily follow from the proposition stated at the very beginning of the opinion:

> . . . the duties of the United States with respect to the Indian tribes' moneys must be based on written law: the Constitution, treaties, and acts of Congress.

The Government's duty to make the IMPL fund productive does not stem from rules of equity made by judges or even by this Commission. It stems from acts of Congress—in particular the Act of September 11, 1841, c. 25, 5 Stat. 465.

The 1841 act is two-pronged. It requires investment of the principal of all funds held in trust by the United States *and* investment of the accruing interest. Both requirements are of equal authority. We are not free to read either out of the statute.

[546] Certainly we are not free to disregard the entire 1841 act because it would give the Indians more interest than we think fair and honorable dealings entitle them to. Section 2, clause (5), of the Indian Claims Commission

Act (25 U.S.C. §70a(5)) applies only to claims "not recognized by any existing rule of law or equity." These, and these only, are the claims we can adjudicate according to our own conception of fair and honorable dealings. Clause (5) was intended to broaden, not restrict, the tribes' rights to recovery. *Blackfeet and Gros Ventre Tribes v. United States,* 127 Ct. Cl. 807, 818, 119 F. S. 161 (1954).

The measure of damages where interest as well as principal is required to be invested is stated thus in the *Restatement (Second) of Trusts* §207(2) Comment:

> If the trustee is under a duty to reinvest interest received by him and accumulate it for the beneficiary, and fails to do so, he is chargeable with compound interest, since if he had not committed a breach of trust he would have received compound interest.
>
> Illustration:
>
> 1. A bequeaths $1000 to B in trust to deposit it in a certain savings bank and leave it there on deposit until C reaches the age of twenty-one and then to pay the principal and accumulated interest to C. B fails to make the deposit. The savings bank pays 3 per cent compound interest. B is chargeable with compound interest at 3 per cent.

See also *G. Bogert, Trusts and Trustees* §811, note 22 (2d ed. 1962); *T. Lewin, Trusts* 277 (16th ed. W. Mowbray 1964); 3 *A. Scott, Trusts* §207.2 (3d ed. 1967).

[547] From 1883 to 1887, when there was no way to make a withdrawal from the IMPL fund, the dissent admits that the quoted rule applied.

But we are told that after 1887 the United States could accumulate interest or disburse principal and/or income of the IMPL fund in its discretion.

This is not our reading of the law. The 1841 act remained as mandatory after 1887 as before. The 1887 act authorized the Secretary of the Interior in his discretion to use IMPL moneys for the tribes' benefit; but the 1841 act commanded him to invest all the fund, whether consisting of principal or interest, that was not so used.

Since the disallowed expenditures were not used for tribal benefit, the 1841 act continued to operate on them as if they had remained in the IMPL fund. If they had remained there, and been invested in accordance with the 1841 act, compound interest would have been earned. The reason they were not in the fund is the Government's wrong in spending them illegally. To rule that simple interest only is due on the disallowed item would violate the basic principle of equity that one cannot benefit from his own wrong.

Since interest earned after 1887 might have been lawfully expended rather than reinvested, it might be argued that there is no basis for assuming that the interest would have been available for reinvestment, and therefore we must award only simple interest on the disallowed expenditures.

Such reasoning is unpersuasive. Equity favors the beneficiary, not the trustee. There is no more reason for
[548] assuming that the interest would have been lawfully expended than for assuming it would have remained available for reinvestment.

There can be no factual basis for either assumption. The choice must be made as a matter of law. Transactions between the United States acting as a fiduciary and the Indian tribes are to be construed favorably to the latter; doubts are to be resolved in favor of the Indians, not the Government. *United States v. Shoshone Tribe*, 304 U.S. 111, 117 (1938).

Indeed, we have no better means of knowing whether the principal amounts of the disallowed expenditures would have remained available for investment than we have in the case of the interest. If the Secretary of the Interior had not expended them illegally, he might the next instant have expended them legally, so that no interest would have been earned. Thus the dissent's argument followed to its logical conclusion would deny simple as well as compound interest. But it has been held that this is not the law where moneys are improperly withheld from an interest-bearing fund. *Peoria Tribe v. United States*, 390 U.S. 468 (1968); *United States v. Blackfeather*, 155 U.S. 180 (1894).

Such an argument would not only repeal the 1841 act's requirement for reinvestment of interest but its requirement for investment of principal.

I have searched for authority on the question of whether the measure of damages for failure to reinvest accruing interest is affected by the mere existence of a legal alternative to reinvestment, even if the trustee did not avail himself of it. Another way of stating the question is, "Can the trustee reduce his damages from compound interest to simple interest because the trust
[549] instrument, or the law, gave him an option, which he did not exercise, of expending the interest rather than investing it?" The weight of such authority as I have discovered is in the negative.

In *Fowler v. Colt,* 22 N. J. Eq. 44 (1871), a testator directed that $40,000 be held in trust for petitioner "to be paid to him when he arrived at the age of twenty-five years, with the interest thereon by accumulation." Where the executor-trustee never undertook administration of the trust, compound interest was awarded despite a codicil which permitted use of the interest for petitioner's support and education before the latter's twenty-first and twenty-fifth birthdays.

In Re Emmet's Estate, 17 Ch. D. 142 (1881), the testator provided a trust fund for his brother's children. Each child was to get a share upon attaining 21. In the meantime, the fund was to be invested, and the income applied "in, for, or towards the maintenance, education, or advancement of such child or children respectively, and the surplus, if any shall accumulate to and become part of the original share." The trustee mingled the assets with his own, and did not pay over to the plaintiff when the latter became 21.

Vice Chancellor Hall held (at page 149):

> . . . After a child attains twenty-one there is no duty undischarged, except to hand over to the child the fund with the accumulations. The trustee did not so hand it over, nor did he explain to the child that he was entitled to call for and have transferred to him the fund, with the accumulations upon it, in his hands, but he left things in exactly the same position as they were in when the child attained
> [550] twenty-one. Can I then allow a trustee, under such circumstances, to say, 'I am, now that the child has attained twenty-one, holding the fund on a different trust, which does not require any accumulation at all, but merely makes me liable for simple interest; and I can keep it in my hands and use it, and only charge myself with simple interest?' That would be

> inconsistent with the duties the trustee has undertaken. The accumulations should have gone on until the trustee transferred the fund. In my opinion, if he does not hand it over when he ought to do, he must be taken to be holding it still on the same trust and subject to the same obligations as before.

Equity and good conscience, dominant principles in these accounting cases, as well as the plain language of the 1841 act, compel us to award compound interest.

But the act of Congress governs, and only the majority opinion follows it.

/s/John T. Vance
John T. Vance, Commissioner

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[551] Yarborough, Commissioner, dissenting:

The principal conclusion of the majority decision—that Indian trust funds should have been made productive—is one that seems well justified and one I fully support. However, the rationale upon which I support it differs somewhat from the statutory construction ground focused upon by the majority. Furthermore, I would propose a substantially different final result because, I submit, the majority's position with respect to the appropriate measure of damages is erroneous.

The argument of the majority opinion is, simply stated, that the 1841 Act requiring that all trust funds be made productive applies to the IMPL funds created in 1883. The 1841 Act unquestionably is an explicit direction that all trust funds be made productive. The 1883 Act creating the IMPL funds and requiring certain proceeds of Indian reservation lands to be deposited in the Treasury of the trustee is not inconsistent with the 1841 Act. The command of the 1883 Act creating the IMPL funds goes only so far as to collect, credit, and deposit these funds. The 1841 Act's requirement that trust funds be made productive becomes operative after the 1883 Act's obligation is satisfied and the funds are on deposit. To this extent, then, there is no implied repeal of the 1841 Act by the 1883 Act; the Acts are not, to this extent, inconsistent.

While I thus have no quarrel with that part of the majority's construction of the 1841 Act, I am not
[552] convinced that the proper result in this case depends upon finding that the source of the Government's obligation to make productive the Indian trust funds held by it lies within the direction of the 1841 Act. The 1841 Act, it is submitted, imposes only the ordinary obligation of a trustee to make trust funds productive. I would

suggest that such an obligation exists whether or not a specific statutory direction is found. If the phrase "fair and honorable dealings" of the Indian Claims Commission Act has any meaningful content at all as a standard of conduct, it means surely that where the Government collects and controls the disbursement of funds clearly belonging to an Indian tribe, it is responsible for dealing with those funds as prudently as an ordinary trustee. *See United States v. Mason,* ___ U.S. ___ 37 L.Ed.2d 22, 93 S. Ct. ___ (1973); *Seminole Nation v. United States,* 316 U.S. 286, 296-97 (1942); *Manchester Band v. United States,* No. 50276-CBR (N.D. Cal., June 26, 1973). An adequate ground, and a simpler one, for the principal holding in this case—that trust funds should have been made productive—is found in Section 2(5) of our Act: a failure to make trust funds productive gives rise to a claim based upon fair and honorable dealings.

While the majority have found that the source of the Government's obligation to make the IMPL funds productive is the 1841 Act rather than equity's mandate that a trustee make trust funds productive, they have, in construing the intent of the 1841 Act, indicated that the probable purpose of Congress was to extend to public
[553] trust funds the rule of productivity which in 1841 was well established with respect to private trusts,"*** if such rule did not already apply ***." Repeatedly the majority opinion cites settled principles of private trust law to support the majority view of the Government's fiduciary duties with respect to Indian trust funds. Clearly the majority opinion stands for the proposition that the duties and obligations of the United States when it acts in a fiduciary capacity with respect to Indian trust funds are to be construed by reference to established principles governing the duties and obligations of a

private trustee in similar circumstances. This view is, of course, perfectly compatible with recent judicial pronouncements. *See United States v. Mason, supra*, at 27-28; *Manchester Band v. United States, supra*, at 10.

If, as the majority believes (and as I agree) the United States is, with respect to such duties and obligations, equivalent to a private trustee, then it must follow that the rights and remedies of the beneficiaries of a public trust should be identical to those of beneficiaries of a private trust and that the liability of a public trustee who violates his duties and obligations should correspond to the liability of a private trustee who violates the same duties and obligations. Therefore, the United States should be subject to the same measure of damages here as would a private trustee who failed to make trust assets productive.

Section 2 of the 1841 Act speaks in terms of requiring investment of "*** all *** funds held in trust by the United States, and the annual interest accruing
[554] thereon ***." 5 Stat. 465. Interpreting the fine meaning of this language, as the majority opinion does, is, insofar as the IMPL fund is concerned, an academic exercise. Under the 1883 and 1887 Acts relating to the IMPL funds, the United States had authority to accumulate interest or disburse principal and/or income of the IMPL funds in its discretion. The majority agree that such is the meaning of these Acts. Therefore, whether the source of the Government's obligation to make the IMPL funds productive arose under the 1841 Act or under general trust law, that obligation must be construed as operating within the context of the discretionary trust created by the 1883 and 1887 Acts.[1]

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[1]Between 1883 and 1887, accumulation of trust income was required. Therefore what follows is not applicable to the IMPL funds during that period.

While discretion in remedy is a hallmark of proceedings in equity, in the case where a trustee fails in his duty to make trust assets productive, the overwhelming weight of authority holds that the appropriate measure of damages is simple interest year-by-year on the unproductive balance. In *Barney v. Saunders*, 57 U.S. 535, 542 (1853), the Supreme Court, in discussing this question, stated as follows:

*** ***

> On the subject of compounding interest on trustees, there is, and indeed could not well be, any uniform rule which could justly apply to all cases. When a trust to invest has been grossly and willfully neglected; where the funds have been used by the trustees in their own business, or profits made of which they give no account, interest is compounded as a punishment, or as a measure of damages for undisclosed profits and in place of them. For mere neglect to invest, simple interest only is generally imposed. ***

[555] *See also Wheeler v. Bolton*, 28 P. 558, 561-62 (1891); *Restatement (Second) of Trusts* §207(2) (1959); A. Scott, *Law of Trusts*, §207.2 (3d ed. 1967). There are specific exceptions to the rule of simple interest but none of these exceptions is applicable to the facts here.[2] *See Restatement (Second of Trusts* §207(2), comment d. *See*

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[2]The cases cited in the concurring opinion are illustrative of these exceptions. In *Fowler v. Colt*, 22 N.J. Eq. 44 (1871), the trustee was held liable for compound interest where by the terms of the trust he was required to accumulate. *See* A. Scott, *Law of Trusts*, §207.2, n.5 (3d ed. 1967). In *In re Emmet's Estate*, 17 Ch. D. 142 (1881), the trustee mingled trust assets with his own thereby being presumed to have received a return from the trust fund so used at least equal to compound interest.

also Silver King Coalition Mines Co. v. Silver King Consol. Mining Co., 204 F. 166, 180 (8th Cir. 1913), *cert. denied,* 229 U.S. 624 (1913).

The determination of the measure of damages rests upon the fact that the remedy is designed to place the cestui que trust "*** in the position he would have been in if the trustee had performed his duty." G. Bogert, *Trusts and Trustees* §863 (2d ed. 1962). In the case of a discretionary trust, the trustee could have expended the full income annually for the benefit of the cestui que trust. Such annual disbursement would be equivalent to simple interest. Therefore, to place the cestui in the position to which the law entitles him, simple interest is awarded. Indeed that would be the limit of remedy had the defendant taken the property absolutely, and just compensation were awarded under the protection of the Fifth Amendment.

[556] I must therefore dissent from the position of the majority and the extraordinary damages they would award.

/s/Richard W. Yarborough
Richard W. Yarborough, Commissioner

I concur:

/s/Jerome K. Kuykendall
Jerome K. Kuykendall, Chairman

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 326-A

TE-MOAK BANDS OF WESTERN SHOSHONE INDIANS OF NEVADA, suing on behalf of the Western Shoshone Nation of Indians,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

[557] ORDER

In its previous ruling on plaintiff's motion for partial summary judgment (23 Ind. Cl. Comm. 70), the Commission reserved two questions:

1. Whether the defendant is liable for interest on the amounts of its shortages in payments to the Western Shoshone Indians under the treaty of October 1, 1863, 18 Stat. 689.

2. Whether the defendant is liable to the plaintiff for damages on account of the defendant's failure to invest or pay interest upon the fund known as "Indian Moneys, Proceeds of Labor" during the period from 1883 to 1930.

The parties having submitted extensive briefs and historical exhibits on the reserved questions, and oral argument having been held, the Commission proceeded to

consider the same. Whereupon, for the reasons set forth in the opinion this day entered herein,

IT IS ORDERED that the first question stated above is answered in the negative, and the plaintiff's motion for partial summary judgment is denied to the extent that it seeks relief inconsistent with such answer.

IT IS FURTHER ORDERED that the second question stated above is answered in the affirmative, and the plaintiff's motion for partial summary judgment is granted, to the extent stated in the accompanying opinion, insofar as it seeks damages for the plaintiff's failure to invest the principal and accumulated interest of plaintiff's IMPL funds.

[558] IT IS FURTHER ORDERED that the order herein of April 29, 1970, 23 Ind. Cl. Comm. 86, is hereby vacated insofar as it requires the defendant generally to furnish an up-to-date accounting.

IT IS FURTHER ORDERED that the defendant's "Motion to Require Plaintiffs to File More Definite Statement of Continuing Wrongdoings Requiring an Accounting Beyond June 30, 1951", filed March 6, 1973, is denied without prejudice.

IT IS FURTHER ORDERED that the defendant's "Motion to Dismiss for Lack of Jurisdiction", filed April 11, 1973, is denied.

IT IS FURTHER ORDERED that the attorneys for the parties hereto, accompanied by the parties' accountants, together with the attorneys and accountants for the Mescalero Apache Tribe, plaintiff in Docket 22-G, meet at a mutually convenient time and place within 30 days of the date of this order and discuss what further information should be supplied by the Government, and in what form to enable the Commission to complete

adjudication of this case in accordance with the opinion accompanying this order. The parties are further ordered to file with the Commission, within 45 days of the date of this order, a joint statement summarizing their discussions and stating what is agreed upon and what, if anything, remains in disagreement.

Dated at Washington, D.C., this 4th day of October 1973.

/s/John T. Vance
John T. Vance, Commissioner

/s/Margaret H. Pierce
Margaret H. Pierce, Commissioner

/s/Brantley Blue
Brantley Blue, Commissioner

[559] BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 22-G

MESCALERO APACHE TRIBE, et al.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

ORDER

By motion filed September 19, 1969, the plaintiff requested the Commission, among other things to determine as a matter of law that the defendant owed the duty, through June 30, 1930, of managing funds on deposit to plaintiff's credit in the fund known as "Indian Moneys, Proceeds of Labor" in such manner as to produce not less than 5 percent interest per annum compounded annually. In its prior opinion dated June 10, 1970 (23 Ind. Cl. Comm. 188) the Commission reserved its ruling on this question, ordering the parties to file supplementary briefs. Such briefs have been filed, and oral argument has been held, and the Commission has considered the question. Therefore,

IT IS ORDERED that the plaintiff's question is answered as set out in the opinion accompanying this order.

IT IS FURTHER ORDERED that the attorneys for the parties hereto, accompanied by the parties' accountants together with the attorneys and accountants for the Te-Moak Bands of Western Shoshone Indians of Nevada, plaintiff in Docket No. 326-A, meet at a mutually convenient time and place within 30 days of the date of this order and discuss what further information should be supplied by the Government, and in what form, to enable the Commission to complete adjudication of this case in accordance with the opinion accompanying this order. The parties are further ordered to file with the
[560] Commission, within 45 days of the date of this order, a joint statement summarizing their discussions and stating what is agreed upon and what, if anything, remains in disagreement.

Dated at Washington, D.C., this 4th day of October 1973.

/s/John T. Vance
John T. Vance, Commissioner

/s/Margaret H. Pierce
Margaret H. Pierce, Commissioner

/s/Brantley Blue
Brantley Blue, Commissioner

APPENDIX D

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 326-C

THE SHOSHONE-BANNOCK TRIBES OF THE FORT HALL RESERVATION, IDAHO,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

ORDER AND PRETRIAL NOTICE

The plaintiff herein having adopted the briefing and argument of the Te-Moak Bands of Western Shoshone Indians of Nevada, plaintiff in Docket 326-A, on the question of the duty of the defendant to make funds held in trust for the plaintiff productive of income, and the Commission having decided said question in an opinion dated October 4, 1973 (31 Ind. Cl. Comm. 427),

IT IS HEREBY ORDERED that the aforesaid opinion in Docket 326-A shall constitute the law of this case insofar as it applies to the fund known as Indian Moneys, Proceeds of Labor.

IT APPEARING that several of the plaintiff's exceptions to the defendant's accounting herein and the defendant's answers thereto raise issues of law, or purported issues of fact upon which evidence may not be obtainable, and that all such issues ought to be disposed of before trial, currently set for June 2, 1975,

IT IS FURTHER ORDERED that the plaintiff and defendant shall file cross motions for partial summary judgment on or before March 1, 1974.

IT IS FURTHER ORDERED that each party shall have until the close of business on April 1, 1974, to answer the other party's motion, and until the close of business on April 15, 1974, to reply to the answer to its motion. Oral argument will be held on said motions for summary judgment only if specially requested by a moving party on or before April 15, 1974, specifying the issues or matters to be argued.

IT IS FURTHER ORDERED that the parties appear for a pretrial hearing before Commissioner Blue in the hearing room of the Commission at 10:00 a.m. on Tuesday, October 29, 1974. Each party shall bring to said conference a statement in writing of the issues it contends remain to be tried and of its position in regard thereto. Documentary evidence proposed for use at the trial shall be filed and exchanged at said conference, in accordance with Rule 23(e) of this Commission.

The hearing will be held under Rule 22(e) of the General Rules of Procedure and the pretrial instructions contained in the Commission's General Policy Statement §101, effective on July 15, 1968. At the hearing all matters will be considered which would simplify the issues and expedite the trial and ultimate disposition of the case.

The pretrial statements of the parties shall be filed with the Commission and served upon opposing counsel on or before Tuesday, October 15, 1974. An original and two copies shall be filed.

Each party should be represented by the attorney who expects to conduct the actual trial. The said attorney

should familiarize himself with the Commission's pretrial rules and instructions and come with full authority to admit and stipulate undisputed facts, and to waive requirements for formal proof of documents; to discuss possibility of settlement; to furnish names and addresses of witnesses and the nature of their testimony; to submit a list of all documents and other exhibits to be offered at the trial along with a digest describing each document or exhibit; and to discuss points of law.

Dated at Washington, D.C., this 16th day of January 1974.

/s/Jerome K. Kuykendall
Jerome K. Kuykendall, Chairman

/s/John T. Vance
John T. Vance, Commissioner

/s/Richard W. Yarborough
Richard W. Yarborough, Commissioner

/s/Margaret H. Pierce
Margaret H. Pierce, Commissioner

/s/Brantley Blue
Brantley Blue, Commissioner

APPENDIX E

[417]

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 326-A

TE-MOAK BANDS OF WESTERN SHOSHONE INDIANS OF NEVADA, suing on behalf of the Western Shoshone Nation of Indians,
Plaintiff,

v.

THE UNITED STATES OF AMERICA,
Defendant.

Decided: April 4, 1974

Appearances:

Frances L. Horn, Attorney for Plaintiff. Wilkinson, Cragun & Barker and Charles A. Hobbs were on the brief.

Craig A. Decker, with whom was Assistant Attorney General Wallace H. Johnson, Attorneys for Defendant.

OPINION ON MOTION FOR REHEARING

Blue, Commissioner, delivered the opinion of the Commission.

The plaintiff, Western Shoshone Nation, has filed a motion for rehearing directed to our decision in this

docket of October 4, 1973 (31 Ind. Cl. Comm. 427).[1] There are three things the plaintiff asks us to do:

[418] (1) Rule that the defendant is liable to it for not investing the interest earned on the Western Shoshone's separate "Proceeds of Labor" account established in 1930.

(2) Reverse our ruling that shortages in payments under treaties are not trust funds within the meaning of the Act of September 11, 1841, 31 U.S.C. §547a.

(3) Rule that the defendant is liable for lost income, if at any time after 1930 the plaintiff's Proceeds of Labor fund could have been invested in authorized securities yielding interest at a higher rate than the 4 percent paid by the treasury.

The defendant opposes all three aspects of the motion.

The plaintiff has also filed supplemental exceptions to the defendant's accounting. Pursuant to leave granted, the defendant answered these exceptions on March 28, 1974. The present opinion does not deal with issues raised for the first time by the answer.

In Part IV of this opinion we present a calculation of the damages due to the Western Shoshone Nation under our October decision.

The first three parts of this opinion dispose of the three aspects of the plaintiff's motion for rehearing.

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[1] The other plaintiff involved in the decision of October 4, 1973, the Mescalero Apache Tribe, Docket 22-G, has not joined in the present motion. The defendant has already filed notice of appeal in Docket 22-G.

I.

INVESTMENT OF NON-INTEREST-BEARING FUNDS MADE UP OF INTEREST ON PROCEEDS OF LABOR FUND.

In our October opinion we declined to adjudicate the question of the Government's duty to invest the non-interest-bearing fund made up of interest paid upon
[419] the plaintiff's Proceeds of Labor fund, because of the plaintiff's failure to raise the question by appropriate exception. The first supplemental exception supplies the deficiency. This exception, designated No. 12 to preserve the sequence with the original 11 exceptions, applies both to the non-interest-bearing treasury accounts and to the interest-bearing accounts which the plaintiff contends in the third part of its motion could have been invested outside the treasury for a greater return. It reads as follows:

> Defendant failed to invest funds in the Treasury held for the benefit of plaintiff and not earning interest equal to what that fund could have earned if invested in United States government securities or deposited in state banks pursuant to the Acts of May 25, 1918, 40 Stat. 561, 591, and June 24, 1938, 52 Stat. 1037.

Defendant answered the supplemental exceptions only on March 28, 1974, raising several issues of law and perhaps also of fact. Obviously, it is too early to adjudicate the supplemental exceptions. On the state of the record existing when it was rendered, our October 4 decision was correct in regard to the question of

reinvestment of the Proceeds of Labor interest. It will not be disturbed at this time.[2]

Part I of the motion for rehearing is denied.

II.

SHORTAGES IN TREATY PAYMENTS AS TRUST FUNDS.

We stated in our October opinion, "The cases indicate that shortages in payments required by treaty are
[420] ordinarily regarded as breaches of contractual obligation rather than as breaches of trust." After quoting an opinion of the Comptroller General (A-27307 of September 30, 1929), which distinguished Indian trust funds from unexpended balances of appropriations for particular objects contemplated by Indian treaty, we stated (31 Ind. Cl. Comm. 543):

> The plaintiffs have given us no reason to reexamine the law upon this point.

What we wrote was literally true; the plaintiffs did not brief their contention that moneys appropriated to satisfy treaty obligations are trust funds; and we considered the contention effectively abandoned. The present plaintiff now strongly urges us to reconsider and change our ruling.

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[2]The plaintiff suggests we should consider the question of the defendant's duty to invest IMPL interest as an issue tried by express or implied consent of the parties within the meaning of Commission Rule 13(b), 25 C.F.R. §503.13(b), because it was argued in the briefs filed before our October 4 decision. Those briefs, however, applied to nine other accounting cases besides *Te-Moak* and *Mescalero Apache*. In one or more of those cases the question was appropriately raised by exception and will be decided by the Commission in due course.

What is really at issue in this case is not the abstract question of the trust status of treaty appropriations, but the very specific question of whether this plaintiff is entitled to interest on shortages in the payments due to it under the Western Shoshone Treaty of October 1, 1863, 18 Stat. 689. One of the theories the plaintiff urged in support of its claim to interest was that the treaty appropriations were trust funds within the meaning of the Act of September 11, 1841, 31 U.S.C. §547a. In October we did not think they were, and we still do not.

We found the meaning of the phrase in the 1841 law, "funds held in trust by the United States," largely by examining what the Government documents of the day
[421] referred to as trust funds. *See* 31 Ind. Cl. Comm. 443-47, 453-57. Most of these funds were created by law as express trusts. A few were set up by administrative action. But all of them, whether *de jure* or *de facto*, shared the common characteristic of being active trusts in actual existence.[3]

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[3]The quotation from the Comptroller General's 1929 decision given in our October opinion, 31 Ind. Cl. Comm. at 542, would require a specific provision of law to create a trust fund out of appropriated moneys. Historically this has not always been true. The Chippewa, Ottawa, and Pottawatomie mill fund, described at pages 445-46 of our earlier opinion, was set up by the Commissioner of Indian Affairs in 1837 without any clear-cut legal authority. Even one of the accounts identified as a trust fund in the Comptroller General's decision itself (5X065.5 "Payment to Indians of Fort Belknap Reservation, Montana, for Lands") appears to have been set up by administrative action. It consisted of the consideration paid by the United States for school sections in the reservation which it granted to the State of Montana by the Act of March 3, 1921, c. 135, 41 Stat. 1355, a statute without trust provisions. *See Blackfeet Tribes v. United States*, 32 Ind. Cl. Comm. 65, 124 (1973).

[Footnote continued]

In contrast, the appropriations to fulfill the 1863 [422] treaty were never required by law to be set up as trust funds,[4] nor actually set up as such by administrative

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The Comptroller General's decision is good authority for the proposition that unexpended balances of appropriations to fulfill Indian treaties are not *ipso facto* trust funds, but not for the proposition that a specific or express provision of law is always necessary to create an Indian trust fund.

[4]The treaty language is devoid of any implication of a trust (18 Stat. 690):

> . . . the United States promise and agree to pay to the said bands of the Shoshonee nation parties hereto, annually for the term of twenty years, the sum of five thousand dollars in such articles, including cattle for herding or other purposes, as the President of the United States shall deem suitable for their wants and condition, either as hunters or herdsmen.

The appropriation acts are equally devoid of trust language, for example:

Act of March 3, 1865, c. 127, 13 Stat. 541, 557:

> *Western Band of Shoshonees.*—For first of twenty installments in such articles, including cattle for herding or other purposes, as the President shall deem suitable for their wants and condition, either as hunters or herdsmen, per seventh article treaty October first, eighteen hundred and sixty-three, for the fiscal year ending June thirtieth, eighteen hundred and sixty-five, five thousand dollars.
>
> For second of twenty installments for same objects, for the fiscal year ending June thirtieth, eighteen hundred and sixty-six, five thousand dollars.

Act of July 26, 1866, c. 266, 14 Stat. 255, 272:

> *Western Bands of Shoshonees.*—For third of twenty installments, to be expended under the direction of the President in the purchase of such articles as he may deem suitable to their wants, either as hunters or herdsmen, per seventh article treaty October first, eighteen hundred and sixty-three, five thousand dollars.

The same formula, with minor and immaterial variations, was repeated in each appropriation act to and including the Act of

[Footnote continued]

action. The 1841 act, in our opinion, did not extend to them.

[423] We are aware that the Supreme Court held in *Quick Bear v. Leupp,* 210 U.S. 50 (1908), that moneys appropriated annually by Congress to pay an Indian treaty debt in installments were morally the Indians' own to the same extent as an Indian trust fund.[5] The question before the Court was whether a congressional policy against making appropriations to educate Indians in sectarian schools applied only to public moneys of the

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March 1, 1883, c. 61, 22 Stat. 433, 443, which provided the twentieth and last installment. *See* Acts of March 2, 1867, c. 173, 14 Stat. 492, 508; July 27, 1868, c. 248, 15 Stat. 198, 215; April 10, 1869, c. 16, 16 Stat. 13, 31; July 15, 1870, c. 296, 16 Stat. 335, 351; March 3, 1871, c. 120, 16 Stat. 544, 561; May 29, 1872, c. 233, 17 Stat. 165, 181; February 14, 1873, c. 138, 17 Stat. 437, 454; June 22, 1874, c. 389, 18 Stat. 146, 165; March 3, 1875, c. 132, 18 Stat. 420, 439; August 15, 1876, c. 289, 19 Stat. 176, 190; March 3, 1877, c. 101, 19 Stat. 271, 285; May 27, 1878, c. 142, 20 Stat. 63, 79; February 17, 1879, c. 87, 20 Stat. 295, 309; May 11, 1880, c. 85, 21 Stat. 114, 126; March 3, 1881, c. 137, 21 Stat. 485, 496; May 17, 1882, c. 163, 22 Stat. 68, 79.

Section 5 of the Act of July 12, 1870, c. 251, 16 Stat. 261, R. S. §3690, was applicable to all installments after the first six. It provided for the lapse of annual appropriations at the end of the fiscal year for which made unless committed to the payment of expenses properly incurred or the fulfillment of contracts properly made during that year. The section did not apply to permanent or indefinite appropriations. Yet the treaty installments continued to be provided by annual appropriations after July 12, 1870, as before. No action was taken to shift them into the form of permanent or indefinite appropriations, or language used to prevent them from lapsing.

[5]The defendant has cited this case to us. The defendant agrees with the plaintiff that there is no significant distinction between treaty appropriations and trust funds. But it contends damages measured by interest should not be awarded on either under authority of the 1841 act, while the plaintiff contends damages should be awarded on both.

United States, or also extended to the Indians' own moneys in control of the Government. The court held the policy restricted to public moneys. In its further holding that the treaty appropriations fell in the category of Indian money rather than public money, we believe the court was applying the maxim, "Equity regards as done
[424] what ought to be done." Since the treaty appropriations were for payment of a debt owed to the Indians, the court considered the beneficial ownership already transferred, as legal ownership would be upon the actual payment. This was not equivalent to obliterating the distinction between treaty appropriations and trust funds. It was a resort to equitable fiction for the purpose of solving a delicate First Amendment question. In any event, *Quick Bear v. Leupp, supra,* decided in 1908, sheds no light at all on what the Congress of 1841 may have meant by "funds held in trust by the United States."

Even if the treaty appropriations involved in the instant case were trust funds within the meaning of the 1841 act, plaintiff would not be entitled to interest. The 1841 act requires investment of trust funds only "when not otherwise required by treaty." The Western Shoshone treaty of 1863 required the funds here at issue to be used otherwise than for investment. They were to be paid out annually in goods. In 19 successive appropriation acts Congress reiterated that these moneys were to be used within the fiscal year to purchase articles for the Indians. The treaty and the acts were wholly incompatible with investment.

The 1841 act does not authorize us to award interest against the Government. It merely requires the Government to invest Indian trust funds, unless otherwise required by treaty, in Government securities bearing not less than 5 percent interest. In cases where the

Government has failed to comply with the terms of the act, section 1, clause 1 of the Indian Claims Commission Act (25 U.S.C. §70a) authorizes us to award damages for the resulting loss of interest. But here there was no violation of the 1841 act since the 1863 treaty provided
[425] that sums appropriated in fulfillment of that treaty be used for certain specific purposes, not including investment in Government bonds. Since the 1841 act is not applicable to the 1863 treaty appropriations, plaintiff is not entitled to damages for lost interest on any part of those appropriations, including the parts (i.e., shortages) which have never been paid to it.

Part II of the motion for rehearing is denied.

III.

FAILURE TO WITHDRAW PROCEEDS OF LABOR FUND FROM TREASURY AND INVEST IT IN SECURITIES PAYING MORE THAN 4 PERCENT INTEREST.

The plaintiff asks us to declare that if in the post-1930 period the Western Shoshone Proceeds of Labor fund could have been legally invested at more than the 4 percent provided by the Act of June 30, 1930, 25 U.S.C. §161b, the defendant is liable for the lost income. For this proposition, plaintiff cites *Manchester Band v. United States,* No. 50276-CBR (N.D. Cal. June 26, 1973), slip op. pp. 13-14.

We must decline the plaintiff's request for two reasons.

First, the plaintiff appears to be asking us to rule on an academic question. At the present time we do not know if any of the securities legal for the investment of Indian trust funds yielded more than 4 percent during the period 1930-1946. The U.S. Bureau of the Census, *Historical*

Statistics of the United States, Colonial Times to 1957, at 656, for example, shows the average yields on U.S. Government bonds as 3.29 percent in 1930, rising to a high of 3.68 in 1932, falling to a low of 2.05 in 1941, and standing at 2.19 in 1946. The yields never reached 4 percent.

Conceivably, some legal investments for Indian trust funds may have yielded more than 4 percent at some time between 1930 and 1946. Supplemental Exception No. 12 is broad enough to authorize introduction of
[426] evidence at the trial in support of the plaintiff's claim for lost income, if it should wish to pursue the matter further.[6]

Second, we find no authority outside of *Manchester Band* to the effect that a trustee is under a duty to maximize income. The rule applicable to private trustees who are restricted to a legal list of investments, like the United States in respect to Indian trust funds, is only that they must use reasonable skill and prudence in choosing among the listed items. G. Bogert, *Trusts and Trustees*, §614 (2 ed. 1965).

If the plaintiff establishes that there were legal securities yielding more than 4 percent in the 1930-1946 period, the defendant, therefore, may present evidence or argument to show that its failure to invest in them was consistent with reasonable skill and prudence.

We cannot, of course, consider possible failures of the Government after August 13, 1946, to withdraw moneys

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[6]Defendant, in its answer filed March 28, 1974, denies plaintiff's right to have the supplemental exceptions considered. We will decide this question on an appropriate future occasion and do not prejudge it here.

from the treasury and invest in securities yielding more than 4 percent, unless the plaintiff proves such failures part of a wrongful course of action which started before that date. *Cf. Blackfeet, supra*, 32 Ind. Cl. Comm. at 71-76.

Part III of the motion for rehearing is denied.

IV.

COMPUTATION OF DAMAGES FOR FAILURE TO INVEST THE IMPL FUND DURING THE PERIOD 1883-1930

In our order of October 4, 1973 (31 Ind. Cl. Comm. 558) we directed the lawyers and accountants on both sides of this case to meet together and discuss what further information should be supplied to enable the Commission to complete adjudication of this case in
[427] accordance with our opinion holding the IMPL fund ought to have been invested during the period from 1883 to 1930. We ordered the parties to submit a joint statement within 45 days, summarizing the results of their discussions; and we stated we would not extend the periods for conferring and submitting the statement on account of the filing of any motion for rehearing.

The lawyers and accountants did meet, but were unable to agree on a statement.

We had hoped that the parties could agree on the method of calculating damages for the noninvestment. We believed such an agreement would have been of substantial value to the Commission in its further consideration of this and similar cases, and to the Court of Claims on appeal. We did not, of course, intend that the defendant's agreement on methods of calculation should be deemed a waiver of its right to appeal. We did,

however, expect the parties in good faith to cooperate in removing one potential cause of the well-nigh intolerable delays that have attended our accounting cases. *See Blackfeet, supra,* 32 Ind. Cl. Comm. at 143-146. We have been disappointed in that expectation.

In view of its failure to agree even on accounting methods, we questioned the basis of the following statement made by the defendant on December 10, 1973, in its Motion to Enlarge Time Within Which to File Record on Appeal in the companion case, *Mescalero Apache Tribe,* Docket 22-G:

> The October 4th ruling of the Commission (i.e. granting the equivalent of compound interest against the United States extending over many years) is a most far-reaching decision. If allowed to stand, it may give rise (in conjunction with other cases) to the award of as much or more money damages
> [428] against the United States as all the other judgments rendered under the Indian Claims Commission Act.

We have, therefore, caused our own calculation of damages to be made. The calculation appears on the following pages. Disbursements disallowed by our 1970 decision have been restored to the fund.[7] We have obtained the dates of the payments on reimbursable agreements, not given in the General Services Administra-

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[7] *See Te-Moak Bands of Western Shoshone Indians or Nevada v. United States,* 23 Ind. Cl. Comm. 70, 83 (1970).

The item for "Pay of agency personnel—Clerk, Cook, Laborer, Line Rider, Painter, Plumber," given as $67,681.16 in the 1970 decision, contains an arithmetical error and should be $64,481.16. Accordingly, the total of the disallowed items should be $115,745.91 instead of $118,745.91. Only $87,161.55 of this sum was disbursed prior to July 1, 1930, so as to figure in the attached calculation.

tion report on file herein, by a telephone call to the Indian Claims Division of that agency. Otherwise we have based our calculation exclusively on the existing GSA report.

The attached calculation is tentative and subject to revision prior to our final award. There may be further disallowances as a result of the trial. The dates we obtained outside the record are subject to challenge by either party, and will be changed if shown to be incorrect. And the parties may, perhaps, persuade us to use a different method of calculation. We believe, however, that based on the information we now have, the attached calculation is substantially accurate.

It is notable that the damages since July 1, 1930, which are measured by 4 percent simple interest, greatly
[429] exceed the damages before that date, which consist of the aggregate of disallowed items and 5 percent compound interest. The total damages through June 30, 1973 ($379,323.72), would rank among the smaller awards of this Commission.

The attached calculation was made for the Commission by Mr. Martin Gallagher of our staff, who was formerly employed in the Tribal Claims Section of the General Accounting Office and the General Services Administration. It took him approximately 60 hours to complete the calculation.

We will expect the revived Indian Claims Division of the General Services Administration, with its staff of 118, to perform similar calculations with equal or greater dispatch.

/s/Brantley Blue
Brantley Blue, Commissioner

"Indian Moneys, Proceeds of Labor, Western Shoshone Indians, Nevada"

Fiscal Year	Carried Forward	Interest at 5%	Receipts	Payments on Reimbursable Agreements	Total	Allowed Disbursements	Balance Forward
1899	--	--	$ 5.00	--	$ 5.00	--	$ 5.00
1900	$ 5.00	$ .25	15.00	--	20.25	--	20.25
1901	20.25	1.01	25.00	--	46.26	--	46.26
1902	46.26	2.31	876.18	--	924.75	--	924.75
1903	924.75	46.24	400.00	--	1,370.99	--	1,370.99
1904	1,370.99	68.55	962.24	--	2,401.78	$ 2,061.24	340.54
1905	340.54	17.03	901.00	--	1,258.57	--	1,258.57
1906	1,258.57	62.93	1,181.98	--	2,503.48	201.00	2,302.48
1907	2,302.48	115.12	923.65	--	3,341.25	209.00	3,132.25
1908	3,132.25	156.61	1,125.00	--	4,413.86	3,119.30	1,294.56
1909	1,294.56	64.73	1,600.00	--	2,959.29	158.70	2,800.59
1910	2,800.59	140.03	3,842.00	--	6,782.62	2,782.48	4,000.14
1911	4,000.14	200.00	4,858.00	--	9,058.14	3,211.62	5,846.52
1912	5,846.52	292.33	5,713.75	--	11,856.60	1,479.90	10,372.70
1913	10,372.70	518.64	6,318.75 (a) 487.95		17,698.04	1,953.58	15,744.46
1914	15,744.46	787.22	6,054.28	--	22,585.96	6,383.55	16,202.41
1915	16,202.41	810.12	78.20	--	17,090.73	5,672.19	11,418.54
1916	11,418.54	570.93	11,446.97	$ 1,268.42	24,704.86	11,181.04	13,523.82
1917	13,523.82	676.19	9,538.75	1,371.86	25,110.62	5,581.41	19,529.21
1918	19,529.21	976.46	62.50	1,743.72	22,311.89	3,660.15	18,651.74
1919	18,651.74	932.59	10,804.00	2,162.70	32,551.03	134.28	32,416.75
1920	32,416.75	1,620.84	28,777.22	1,177.09	63,991.90	5,520.69	58,471.21
1921	58,471.21	2,923.56	1,625.12	2,839.98	65,859.87	16,929.47	48,930.40
1922	48,930.40	2,446.52	15,083.03	1,691.50	68,151.45	9,691.69	58,459.76
1923	58,459.76	2,922.99	15,765.00	1,210.04	78,357.79	11,198.60	67,159.19
1924	67,159.19	3,357.95	16,087.00	1,616.37	88,220.51	12,594.20	75,626.31
1925	75,626.31	3,781.31	15,674.61	949.79	96,032.02	8,143.39	87,888.63

"Indian Moneys, Proceeds of Labor, Western Shoshone Indians, Nevada"

Fiscal Year	Carried Forward	Interest at 5%	Receipts	Payments on Reimbursable Agreements	Total	Allowed Disbursements	Balance Forward
1926	$ 87,888.63	$ 4,394.43	$ 15,637.50	$ 1,008.94	$108,929.50	$ 7,436.32	$ 101,493.18
1927	101,493.18	5,074.66	16,229.24	846.07	123,643.15	9,043.49	114,599.66
1928	114,599.66	5,729.98	15,234.61	856.86	136,421.11	9,644.36	126,776.75
1929	126,776.75	6,338.84	15,111.34	756.61	148,983.54	10,568.26	138,415.28
1930	138,415.28	6,920.76	15,397.62	385.32	161,118.98	9,139.89	151,979.09
1930	--	(b) 394.57	--	--	152,373.66	--	152,373.66
		52,345.70	237,842.49	19,885.27		157,699.80	

(a) Transferred from "IMPL, Western Nevada Indian School."

(b) Interest on 1930 receipts and Payment on Reimbursable Agreements from Jan. 1, 1930 to June 30, 1930.

Existing Report:	
Receipts to June 30, 1930	$237,842.49
Payments on Reimbursable Agreements	19,885.27
Add-Disbursed without deposit	50.00
	$257,777.76
Disbursed to June 30, 1930	244,861.35
	$ 12,916.41

Restatement (see above)	
Restated Balance on June 30, 1930	$152,373.66
Deduct-existing Reporting Balance on June 30, 1930	12,916.41
	$139,457.25
Interest at 4% from July 1, 1930 to June 30, 1973 = 43 years at 4%, or 172%	239,866.47
	$379,323.72

We concur:

/s/John T. Vance
John T. Vance, Commissioner

/s/Margaret H. Pierce
Margaret H. Pierce, Commissioner

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[432] Kuykendall, Chairman, concurring in part:

I concur in the results reached by the Commission in parts I, II, and III of its opinion and express no opinion concerning Part IV since I, along with Commissioner Yarborough, have heretobefore concluded in this case that compound interest is not allowable (31 Ind. Cl. Comm. 427, 551).

/s/Jerome K. Kuykendall
Jerome K. Kuykendall, Chairman

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[433] Yarborough, Commissioner, concurring in part, dissenting in part

Since dissenting to the earlier decision in *Te-Moak Bands of Western Shoshone Indians v. United States,* 31 Ind. Cl. Comm. 427 (1973), insofar as it assessed damages measured by compound interest for failure to invest Indian trust funds, I have accepted that case as precedent and joined the majority of the Commission in other cases and orders based on their principles. Continuing to feel those principles erroneous, however, I temporarily withdraw my acquiescence in order to point out two aspects

of the instant decision that compound the intellectual difficulty in which the majority have placed themselves.

In Part II, *supra*, the majority properly finds that shortages in required treaty payments will not support an award of interest as damages on the shortages. Since the payments were never made, they could not have become part of an Indian trust fund, and the obligation to make such trust funds productive cannot be invoked. I would suggest that similarly interest awarded as damages for the failure to make a trust fund productive is equally a sum that never was in an Indian trust fund (indeed, never existed), and the defendant cannot be charged with a failure to make that non-trust fund sum productive.

In Part IV, *supra*, the majority provides a table demonstrating how their extraordinary engine of compound interest damages can be computed. Without explanation the compounding is broken off as of June 30, 1930, and the balance that then should have been in
[434] the IMPL account is the basis for damages of simple interest only from then to date. If the requirement for productivity of the 1841 Act requires compound interest on what should have been the balance before 1930, the requirement exists equally on the re-cast balance after 1930. That after that date actual simple interest was being paid on the actual IMPL balance is a complicating factor, but cannot logically be said to destroy the compounding that the majority insists is a requirement of productivity. I doubt that this demonstration will convince the defendant that the majority's rule of damages is innocuous, and it reinforces my belief that it is erroneous.

This said, I concur in the order.

/s/Richard W. Yarborough
Richard W. Yarborough, Commissioner

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[435] BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 326-A

TE-MOAK BANDS OF WESTERN SHOSHONE INDIANS OF NEVADA, suing on behalf of the Western Shoshone Nation of Indians,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR REHEARING

UPON CONSIDERATION of the plaintiff's motion for rehearing filed herein on November 28, 1973, and the defendant's response thereto, and for the reasons stated in the opinion entered herein this day,

IT IS ORDERED that said motion be denied.

Dated at Washington, D.C., this 4th day of April, 1974

/s/Jerome K. Kuykendall
Jerome K. Kuykendall, Chairman

/s/John T. Vance
John T. Vance, Commissioner

/s/Richard W. Yarborough
Richard W. Yarborough, Commissioner

/s/Margaret H. Pierce
Margaret H. Pierce, Commissioner

/s/Brantley Blue
Brantley Blue, Commissioner

APPENDIX D

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

(1)

Act of September 11, 1841, 5 Stat. 465:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That so much of the sixth section of an act entitled, "An act to provide for the support of the Military Academy of the United States for the year eighteen hundred and thirty-eight, and for other purposes," as requires the Secretary of the Treasury to invest the annual interest accruing on the investment of the money arising from the bequest of the late James Smithson, of London, in the stocks of States, be, and the same is hereby, repealed. And the Secretary of the Treasury shall, until Congress shall appropriate said accruing interest to the purposes prescribed by the testator for the increase and diffusion of knowledge among men, invest said accruing interest in any stock of the United States bearing a rate of interest not less than five per centum per annum.

Sec. 2. *And be it further enacted,* That all other funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall in like manner be invested in stocks of the United States, bearing a like rate of interest.

Sec. 3. *And be it further enacted,* That the three clerks, authorized by the act of June twenty-third, eighteen hundred and thirty-six, "to regulate the deposits of the public money," be, and hereby are, directed to be retained and employed in the

Treasury Department, as provided in said act, until the state of the public business becomes such that their services can conveniently be dispensed with.

Section 2 now appears as 31 U.S.C. 547a as follows:

All funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall be invested in stocks of the United States, bearing a rate of interest not less than 5 per centum per annum. R.S. §3659.

(2)

Section 28 of Bureau of Indian Affairs Appropriations Act of May 25, 1918, 40 Stat. 591 (formerly 25 U.S.C. 162):

That the Secretary of the Interior be, and he is hereby, authorized, under such rules and regulations as he may prescribe, to withdraw from the United States Treasury and segregate the common, or community funds of any Indian tribe which are, or may hereafter be, held in trust by the United States, and which are susceptible of segregation, so as to credit an equal share to each and every recognized member of the tribe except those whose pro rata shares have already been withdrawn under existing law, and to deposit the funds so segregated in banks to be selected by him, in the State or States in which the tribe is located, subject to withdrawal for payment to the individual owners or expenditure for their benefit under the regulations governing the use of other individual Indian moneys. The said Secretary is also authorized, under such rules and regulations as he may prescribe, to withdraw from the Treasury and deposit in banks in the State or States in which the tribe is located to the credit of the respective tribes, such common, or community,

> trust funds as are not susceptible of segregation as aforesaid, and on which the United States is not obligated by law to pay interest at higher rates than can be procured from the banks: *Provided,* That no tribal or individual Indian money shall be deposited in any bank until the bank shall have agreed to pay interest thereon at a reasonable rate and shall have furnished an acceptable bond or collateral security therefor, and United States bonds may be furnished as collateral security for either tribal or individual funds so deposited, in lieu of surety bonds: *Provided further,* That the Secretary of the Interior, if he deems it advisable and for the best interest of the Indians, may invest the trust funds of any tribe or individual Indian in United States Government bonds: *And provided further,* That any part of tribal funds required for support of schools or pay of tribal officers shall be excepted from segregation or deposit as herein authorized, and the same shall be expended for the purposes aforesaid: *Provided, however,* That the funds of any tribe shall not be segregated until the final rolls of said tribe are complete: *And provided further,* That the foregoing shall not apply to the funds of the Five Civilized Tribes, or the Osage Tribe of Indians, in the State of Oklahoma, but the funds of such tribes and individual members thereof shall be deposited in the banks of Oklahoma or in the United States Treasury and may be secured by the deposit of United States bonds.

This provision was replaced by Act of June 24, 1938, 52 Stat. 1037 which now appears as 25 U.S.C. 162a as follows:

> The Secretary of the Interior is hereby authorized in his discretion, and under such rules and regulations as he may prescribe, to withdraw from the United States Treasury and to deposit in banks to be

> selected by him the common or community funds of any Indian tribe which are, or may hereafter be, held in trust by the United States and on which the United States is not obligated by law to pay interest at higher rates that can be procured from the banks. The said Secretary is also authorized, under such rules and regulations as he may prescribe, to deposit in banks to be selected by him the funds held in trust by the United States for the benefit of individual Indians: *Provided,* That no individual Indian money shall be deposited in any bank until the bank shall have agreed to pay interest thereon at a reasonable rate, subject, however, to the regulations of the Board of Governors of the Federal Reserve System in the case of member banks, and of the Board of Directors of the Federal Deposit Insurance Corporation in the case of insured nonmember banks, except that the payment of interest may be waived in the discretion of the Secretary of the Interior on any deposit which is payable on demand: *Provided further,* That no tribal or individual Indian money shall be deposited in any bank until the bank shall have furnished an acceptable bond or pledged collateral security therefor in the form of any public-debt obligations of the United States and any bonds, notes, or other obligations which are unconditionally guaranteed as to both interest and principal by the United States, except that no such bond or collateral shall be required to be furnished by any such bank which is entitled to the benefits of section 264 of Title 12, with respect to any deposits of such tribal or individual funds to the extent that such deposits are insured under such section: *Provided, however,* That nothing contained in this section, or in section 264 of Title 12, shall operate to deprive any Indian having unrestricted funds on deposit in any such bank of the full

protection afforded by section 264 of Title 12, irrespective of any interest such Indian may have in any restricted Indian funds on deposit in the same bank to the credit of a disbursing agent of the United States. For the purpose of this section and section 264 of Title 12, said unrestricted funds shall constitute a separate and distinct basis for an insurance claim: *Provided further,* That the Secretary of the Interior, if he deems it advisable and for the best interest of the Indians, may invest the trust funds of any tribe or individual Indian in any public-debt obligations of the United States and in any bonds, notes, or other obligations which are unconditionally guaranteed as to both interest and principal by the United States: *And provided further,* That the foregoing shall apply to the funds of the Osage Tribe of Indians, and the individual members thereof, only with respect to the deposit of such funds in banks.

(3)

In pertinent part, Deficiency Appropriations Act of March 3, 1883, 22 Stat. 582, 590, provided:

> The proceeds of all pasturage and sales of timber, coal, or other product of any Indian reservation, except those of the five civilized tribes, and not the result of the labor of any member of such tribe, shall be covered into the Treasury for the benefit of such tribe under such regulations as the Secretary of the Interior shall prescribe; and the Secretary shall report his action in detail to Congress as its next session.

This provision was supplemented by provision contained in Indian Department Appropriations Act of March 2, 1887, 24 Stat. 449, 463, as follows:

> That the Secretary of the Interior is hereby authorized to use the money which has been or may hereafter be covered into the Treasury under the provisions of the act approved March third, eighteen hundred and eighty-three, and which is carried on the books of that Department under the caption of "Indian moneys, proceeds of labor," for the benefit of the several tribes on whose account said money was covered in, in such way and for such purpose as in his discretion he may think best, and shall make annually a detailed report thereof to Congress.

The above provisions of 1883 and 1887 Acts were amended by Act of May 17, 1926, 44 Stat. 560, which now appears as 25 U.S.C. 155, as follows:

> All miscellaneous revenues derived from Indian reservations, agencies, and schools, except those of the Five Civilized Tribes and not the result of the labor of any member of such tribe, which are not required by existing law to be otherwise disposed of, shall be covered into the Treasury of the United States under the caption "Indian moneys, proceeds of labor", and are hereby made available for expenditure, in the discretion of the Secretary of the Interior, for the benefit of the Indian tribes, agencies, and schools on whose behalf they are collected, subject, however, to the limitations as to tribal funds, imposed by sections 123 and 142 of this title.

(4)

The Act of February 12, 1929, 45 Stat. 1164, *as amended by* Act of June 13, 1930, 46 Stat. 584, appears as 25 U.S.C. 161b, as follows:

> All tribal funds arising under section 155 of this title on June 13, 1930, included in the fund "Indian Money, Proceeds of Labor," shall, on and after July 1, 1930, be carried on the books of the Treasury Department in separate accounts for the respective tribes, and all such funds with account balances exceeding $500 shall bear simple interest at the rate of 4 per centum per annum from July 1, 1930.

(5)

Section 2 of the Indian Claims Commission Act of April 13, 1946, 60 Stat. 1050, as it now appears in 25 U.S.C. 70a, provides in pertinent part:

> The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe . . .: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit;. . . and (5) claims based on fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after August 13, 1946, shall be considered by the Commission.

(6)

Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

No. 75-939

In the Supreme Court of the United States

OCTOBER TERM, 1975

MESCALERO APACHE TRIBE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

PETER R. TAFT,
Assistant Attorney General,

EDMUND B. CLARK,
A. DONALD MILEUR,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

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CITATIONS

Cases:

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-939

MESCALERO APACHE TRIBE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. A) is reported at 518 F.2d 1309. The opinion of the Indian Claims Commission (Pet. App. C) is reported at 31 Ind.Cl.Comm. 427. The opinion of the Indian Claims Commission denying rehearing in Ind.Cl. Comm. Docket No. 326-A (Pet. App. E) is reported at 33 Ind.Cl.Comm. 417. The original opinion of the Indian Claims Commission in Ind.Cl.Comm. Docket No. 326-A is reported at 23 Ind.Cl.Comm. 70. The original opinion of the Indian Claims Commission in

Ind.Cl.Comm. Docket No. 22-G is reported at 23 Ind. Cl.Comm. 181.

JURISDICTION

The judgment of the Court of Claims was entered on July 11, 1975. The order of the court denying a timely petition for rehearing was entered on October 3, 1975 (Pet. App. B). The petition for a writ of certiorari was filed on January 2, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1). See Section 20(c) of the Indian Claims Commission Act, 60 Stat. 1055, 25 U.S.C. 70s(c).

QUESTIONS PRESENTED

The Acts of March 3, 1883, 22 Stat. 582, and March 2, 1887, 24 Stat. 449, 25 U.S.C. 155, established a fund composed of revenues produced by Indian reservations. The questions presented are:

1. Whether Section 2 of the Act of September 11, 1841, 5 Stat. 465, 31 U.S.C. 547a, or any other act prior to the Act of June 13, 1930, 46 Stat. 584, 25 U.S.C. 161b, required the United States to invest the portion of the fund not used for current expenditures and to reinvest the income thereby produced.

2. Whether the United States is liable to petitioners for compound interest as a result of its failure to invest the funds.

STATUTES INVOLVED

The Act of March 3, 1883, 22 Stat. 582, 590, provides in pertinent part:

* * * * *

> The proceeds of all pasturage and sales of timber, coal, or other product of any Indian reservation, * * * and not the result of the labor of any member of such tribe, shall be covered into the Treasury for the benefit of such tribe under such regulations as the Secretary of the Interior shall prescribe; and the Secretary shall report his action in detail to Congress at its next session.

The Act of March 2, 1887, 24 Stat. 449, 463, provides in pertinent part:

* * * * *

> That the Secretary of the Interior is hereby authorized to use the money which has been or may hereafter be covered into the Treasury under the provisions of the act approved March third, eighteen hundred and eighty-three, and which is carried on the books of that Department under the caption of "Indian moneys, proceeds of labor," for the benefit of the several tribes on whose account said money was covered in, in such way and for such purposes as in his discretion he may think best, and shall make annually a detailed report thereof to Congress.

The Act of June 13, 1930, 46 Stat. 584, 25 U.S.C. 161b, provides in pertinent part:

* * * * *

> Sec. 2. All tribal funds arising under the Act of March 3, 1883 (22 Stat. 590), as amended by the Act of May 17, 1926 (44 Stat. 560), now

included in the fund "Indian Money, Proceeds of Labor," shall, on and after July 1, 1930, be carried on the books of the Treasury Department in separate accounts for the respective tribes, and all such funds with account balances exceeding $500 shall bear simple interest at the rate of 4 per centum per annum from July 1, 1930.

The Act of September 11, 1841, 5 Stat. 465, provides in pertinent part:

> Chap. XXV.—*An Act to repeal a part of the sixth section of the act, entitled "An act to provide for the support of the Military Academy of the United States for the year eighteen hundred and thirty-eight, and for other purposes," passed July seventh, eighteen hundred and thirty-eight.*
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That so much of the sixth section of an act entitled, "An act to provide for the support of the Military Academy of the United States for the year eighteen hundred and thirty-eight, and for other purposes," as requires the Secretary of the Treasury to invest the annual interest accruing on the investment of the money arising from the bequest of the late James Smithson, of London, in the stocks of States, be, and the same is hereby, repealed. And the Secretary of the Treasury shall, until Congress shall appropriate said accruing interest to the purposes prescribed by the testator for the increase and diffusion of knowledge among men, invest said accruing interest in any stock of the United States bearing a rate of interest not less than five per centum per annum.
>
> Sec. 2. *And be it further enacted,* That all other funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall in like manner be invested in stocks of the United States, bearing a like rate of interest.
>
> * * * * *

STATEMENT

The Act of March 3, 1883, 22 Stat. 582, 590, provides that specified revenues from Indian reservations "be covered into the Treasury for the benefit of such tribe under such regulations as the Secretary of the Interior shall prescribe * * *." The account became known as IMPL.[1] The Act of March 2, 1887, 24 Stat. 449, 463, authorized the Secretary of the Interior to use the fund for the benefit of the several tribes at his discretion without further authorization by Congress. No provision was made for investment or payment of interest on the fund (Pet. App. A 3-4), and no interest was paid until 1930 when Congress provided for payment after July 1, 1930, of four percent simple interest on the current balance of each tribal account exceeding $500. Act of June 13, 1930, Sec. 2, 46 Stat. 584 (see pp. 3-4, *supra*). Thereafter, interest was credited as provided in the 1930 statute (Pet. App. A 6-7).

---

[1] Indian Moneys-Proceeds of Labor, a misnomer because under the Act it consisted of Indian monies *not* the proceeds of labor.

Petitioners, under the Indian Claims Commission Act (60 Stat. 1049, as amended, 25 U.S.C. 70 *et seq.*), sought accountings by the United States for all of their funds held by it, including IMPL funds. The United States reported as follows with respect to IMPL funds (Pet. App. A 7):

> [I]n the *Te-Moak* case, Docket No. 326-A, * * * $314,241.19 was deposited in its I.M.P.L. account between 1899 and 1951, and * * * no interest was paid on the fund until June 30, 1930, after which date interest was paid pursuant to the Act of June 13, 1930, at the rate of four percent per annum.
>
> In Shoshone-Bannock, Docket No. 326-C * * * $380,628.76 was deposited in its I.M.P.L. account between 1887 and 1951, and * * * no interest was paid on the account prior to June 30, 1930, after which date interest was paid pursuant to the Act of June 13, 1930, at the rate of four percent per annum.
>
> In Mescalero Apache, Docket No. 22-G, * * * $1,670,620.38 was deposited in the I.M.P.L. account between 1887 and 1950, and * * * no interest was paid on this account until June 30, 1930, after which interest was paid pursuant to the Act of June 13, 1930, at the rate of four percent per annum.[2]

The Indian Claims Commission held (Pet. App. C 55-180) that, under the Act of September 11, 1841 (see pp. 4-5, *supra*), the United States was required to invest the funds not needed for current disburse-

[2] The United States does not deny that these funds are held in trust for the Tribes in question. See Pet. App. A 47).

ments at five percent interest and to reinvest earnings at a like rate (see Pet. App. C 149-153), and that the government's liability should be measured accordingly. The Commission ordered the parties to meet, and, in effect, prepare a pre-trial statement on the additional accounting that would be necessary to comply with the Commission's ruling (Pet. App. C 168-169). There was a concurring opinion by Commissioner Vance (Pet. App. C 170-175) and a dissent by Commissioner Yarborough (Pet. App. C 176-180).

The United States appealed to the Court of Claims[3] which, *en banc*, held that petitioners were not entitled to receive either simple or compound interest on the funds in question. The court held (Pet. App. A 3-7) that the Act of March 3, 1883, as supplemented by the Act of March 2, 1887, did not require payment of interest on IMPL funds deposited in the Treasury, and that interest on this fund was first required by the Act of June 13, 1930.

The court emphasized that interest is collectable against the United States only as specifically permitted by contract or statute (Pet. App. A 8-19); 28 U.S.C. 2516(a) specifically provides that interest against the United States may be allowed "only under a contract or Act of Congress expressly providing for payment thereof." The court considered in detail (Pet. App. A 23-26) the history and purpose of the Act of September 11, 1841, and held that it was not a direction to invest all trust funds held in the

[3] Interlocutory appeal is authorized by 25 U.S.C. 70s(b).

Treasury but was a determination of the kinds of investment that could be made of funds otherwise required to be invested. It found no such investment required by the 1883 Act establishing the IMPL fund.[4] The court denied petitioners' motion for rehearing; Judge Davis dissented (Pet. App. B 53-54).

ARGUMENT

The complex historical background of the handling of Indian funds by the United States has been explored exhaustively in this litigation by the parties, the Indian Claims Commission and the Court of Claims. The decision of the Court of Claims is correct; and it definitively settles the question whether the United States is liable for not investing IMPL funds prior to 1930. There is no reason for further review by this Court.

Petitioners contend, as they did before the Indian Claims Commission and the Court of Claims, that IMPL funds should have been invested by the government at five percent compound interest under the Act of September 11, 1841 (Pet. 8-11). Petitioners also suggest that the same result can be reached under the common law of trusts; the fair and honor-

[4] In his concurring opinion, Judge Nichols equated the IMPL funds to checking accounts (Pet. App. A 39). Judge Davis dissented in part; he agreed that unless a statute required the government to invest the funds it could not be held liable, but he thought the fund was covered by the investment provision of the 1841 Act and in any event that recovery could be had under the fair dealings provision of the Indian Claims Commission Act (Pet. App. A 39-51).

able dealings standard of the Indian Claims Commission Act; and Section 28 of the Act of May 25, 1918,[5] and the Act of June 24, 1938[6] (Pet. 11-12).

1. The Court of Claims discussed at length the application of the Act of September 11, 1841, to Indian funds. In the 1830's there were a number of funds held in trust by the United States under various Indian treaties. By the Act of January 9, 1837, 5 Stat. 135, Congress provided that these funds could be paid into the Treasury, and if the treaties required that they be invested, they could be invested at the direction of the President (Pet. App. A 23).

Large amounts of these funds were invested in state bonds. Shortly after the Act of January 9, 1837, a financial panic and depression caused several States to default on their bonds. As the court below stated (Pet. App. A 23-24), it was against this background, but with the funds of the Smithsonian bequest as its principal concern, that Congress enacted the Act of September 11, 1841 (pp. 4-5, *supra*).

The Court of Claims held that (Pet. App. A 22-23) "[t]he primary purpose of the Act was to prevent any future investment of trust funds in state stocks or bonds. Thus the Act did not create any obligation on the Government to pay interest on trust funds, but only provided *where* they must be invested if any statute or treaty required them to be productive" (emphasis by the court).

[5] 40 Stat. 591, repealed by Section 2 of the Act of June 24, 1938, 52 Stat. 1037. See 25 U.S.C. 162.

[6] 52 Stat. 1037, Sec. 1, 25 U.S.C. 162a.

The Commission and the Court of Claims also reviewed the legislative and administrative treatment of the 1841 Act between its enactment and the present, finding nothing to indicate that the Act was read as requiring the investment of all Indian funds held in trust by the United States at five percent compound interest (Pet. App. A 21-26).

The various treaty provisions and statutes governing Indian funds enacted after the 1841 Act also support the court's view of the Act. These treaties and statutes are difficult to explain if, in fact, all Indian funds held by government agents should have been invested at five percent compound interest. Numerous Indian treaties after 1841 continued to contain a provision for investment of funds, usually at a specified rate of interest, as they had before that date.[7] Such provisions were at best surplusage if a statutory duty already existed to invest all Indian funds at five percent compound interest. Moreover, Section 5 of the General Allotment Act (24 Stat. 390), provided only for three percent simple interest on proceeds of land sales, and numerous statutes provided for four percent interest on Indian funds. Yet there is no indication that those Acts were considered a reduction of otherwise established rates of interest.

Similarly, if there had existed in 1929 and 1930 a general duty to invest Indian funds at five percent

[7] See, *e.g.*, Treaty of October 11, 1842, Art. II, 7 Stat. 596; Treaty of January 14, 1846, Art. II, 9 Stat. 842; Treaty of June 5 and 17, 1846, Art. VII, 9 Stat. 854.

compound interest, the Acts of February 12, 1929, 45 Stat. 1164, and June 13, 1930, 46 Stat. 584, providing that all Indian accounts in the Treasury in excess of $500 shall bear four percent simple interest, would have been a disservice to the Indians. Yet the legislation was designed to benefit the Indian tribes, not to deprive them of what they already had.[8]

This Court has cited the Act of 1841 in four decisions,[9] all of which are discussed by the court below (Pet. App. A 26-29). In two cases, the Court held that the Act did not apply because no trust existed.[10] The remaining cases, *Blackfeather* and *Cherokee Nation*, concerned treaties establishing a duty to pay interest or invest funds. In *Blackfeather* the Court held that a treaty provision calling for establishment of a fund through sale of Indian land, and payment of five percent interest on the balance of the fund, supported an award of principle and simple interest on a deficiency in the fund created by the failure of the government to sell the land in the manner required by the treaty. The Court stated that the treaty called for the same interest "paid upon funds held in trust by the United States" under the Act of 1841 (then R.S. 3659), but did not otherwise comment on the Act (155 U.S. at 192).

[8] See H.R. Rep. No. 2320, 70th Cong., 2d Sess. (1929).

[9] *United States ex rel. Angarica* v. *Bayard*, 127 U.S. 251, 255; *United States* v. *Blackfeather*, 155 U.S. 180, 192; *United States* v. *Omaha Tribe of Indians*, 253 U.S. 275, 281-282; *Cherokee Nation* v. *United States*, 270 U.S. 476, 492.

[10] *Angarica* and *Omaha Tribe, supra.*

In *Cherokee Nation* v. *United States*, 270 U.S. 476, 492, the Court held that the Act of 1841 provided no basis for paying compound, rather than simple interest, on a judgment awarded for funds taken from a trust account established by treaty, pointing out that a contrary interpretation would subject the government to liability in an amount equal to what was then the national debt. The Court's reading of the Act of 1841 in *Cherokee Nation*, while not controlling here, is consistent with the Court of Claims' holding that the Act of 1841 did not require investment of the IMPL account and does not justify an award of compound interest for failure to invest.[11]

2. Petitioners contend (Pet. 11-12) that the Commission's decision should have been sustained under common law (equity) principles of trusts and the grant of jurisdiction to the Indian Claims Commission to hear (25 U.S.C. 70a(5)) "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." While the Court of Claims did not discuss these claims in detail, it did specifically reject them on the basis of the court's prior decisions and 28 U.S.C. 2516(a), which

[11] Petitioners' contention (Pet. 8-9) that the decision below "conflict[s] in principle" with *Peoria Tribe of Indians* v. *United States*, 390 U.S. 468, is incorrect. There the interest the government was required to pay was established by treaty, as it was in *United States* v. *Blackfeather*, 155 U.S. 180, which it followed. Moreover, in *Peoria*, the Court expressly prohibited an award of compound interest. 390 U.S. at 473 n. 6.

authorizes the Court of Claims to allow interest on a claim against the United States only when a contract or federal statute expressly so provides. (see Pet. App. A 36-37).[12] In light of the statutes and treaties specifically requiring investment of funds when Congress found this appropriate, and in light of the absence of such a provision here, as well as the "checking account" nature of the fund (Pet. App. A 39, Nichols, J., concurring), the court properly refused to accept petitioners' claim of breach of trust responsibility or lack of fair dealing.

3. Petitioners finally contend (Pet. 12) that the Commission's decision can be sustained, at least with respect to the period after 1918, by Section 28 of the Act of May 25, 1918,[13] and the Act of June 24, 1938,[14] which replaced the 1918 Act. These Acts *permitted* the Secretary of the Interior to place Indian funds in bank accounts subject to withdrawal by the Tribe or to invest them. They did not *require* him to invest such funds.

[12] As to the fair and honorable dealings claim, see, also, the dissenting opinion (Pet. App. A 49-51; and *id.* at B 54).

[13] See note 5, *supra.*

[14] See note 6, *supra.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1976.

☆ U. S. GOVERNMENT PRINTING OFFICE; 1976 202992 229

IN THE

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TO THE UNITED STATES COURT OF CLAIMS

PETITIONERS' REPLY TO BRIEF FOR UNITED STATES IN OPPOSITION

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March 26, 1976

Washington, D.C. • THIEL PRESS • (202) 638-4521

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In its brief, the government raises four points that petitioners believe are appropriate for reply. These are:

1. that the decision below does not conflict in principle with *Peoria Tribe of Indians v. United States*, 390 U.S. 468 (1968) (Govt. Br. 12 n.11);

2. that petitioners' IMPL accounts can properly be analogized to "checking accounts" (Govt. Br. 8 n.4 and 13);

3. that the provisions of section 28 of the Act of May 25, 1918, and of the Act of June 24, 1938, which authorize the investment of Indian trust funds, being in

terms permissive, do not give rise to an obligation to make such funds productive (Govt. Br. 13); and

4. that section 2 of the Act of September 11, 1841, regardless of its plain language, cannot really have been meant to require the investment of "all funds held in trust by the United States," else there would have been no need in subsequent treaties and statutes to have made further provision for the investment of, or the payment of interest on, Indian moneys in the government's possession (Govt. Br. 10).

1. The court below concluded that the government was not obligated to have made petitioners' trust funds productive because to recognize such an obligation, and award damages for its breach, would entail allowing interest on a claim against the United States.

The court below made precisely the same error in *Peoria.* Reversing there, this Court said (390 U.S. at 470-471):

> . . . this is not a case where the Court is asked to exercise "the power to award interest against the United States" . . . The issue, rather, concerns the measure of damages for the treaty's violation in the light of the Government's obligations under the treaty.

Peoria stands for the principle that an obligation to invest cannot be denied, or damages for its breach refused, simply because the United States is ordinarily not liable to pay interest on claims against it. The decision below clearly conflicts with this principle. It denies existence of the obligation to have made petitioners' funds productive, *a priori*, from the faulty premise that to award damages for its breach would be to award interest on a claim against the United States.

2. Everyone acknowledges that the funds covered into the IMPL account were petitioners' private property and that the government took possession of them strictly as trustee. *See, e.g.*, Govt. Br. 6 n.2. Petitioners were not consulted about and did not consent to the government's taking possession of the funds and depositing them in its Treasury. Nor, of course, were the funds subject to withdrawal on petitioners' orders.

While not disputing that its conduct must be judged by the standards applying to trustees, the government suggests that it was perfectly proper for it, in effect, to deposit its cestuis' funds in a "checking account" in its own bank. What it fails to grasp, given the magnitude of the balances it permitted to accumulate and lie fallow in the IMPL account, is that analogizing this account to a "checking account" is not exculpatory, but admissory, of liability. Indeed, for a trustee to deposit trust funds in a checking account in his own bank is a paradigm breach of trust. *E.g., Blankenship v. Boyle*, 329 F. Supp. 1089 (D.D.C. 1971); and *see Menominee Tribe v. United States*, 101 Ct. Cl. 10, 20 (1944).

3. The government acknowledges that, after adoption of section 28 of the Act of May 25, 1918 (replaced by Act of June 24, 1938, which currently appears as 25 U.S.C. §162a), the Secretary of the Interior was empowered to make petitioners' IMPL funds productive by investment. It contends, nevertheless, because these acts are permissive in terms, that they do not obligate investment where such would be most beneficial to the Indians.

This contention points up the contemporary importance of the issue here.

In a variety of situations today, the government continues to take possession as trustee of funds belonging to Indian tribes and deposit them in accounts in its Treasury. Specifically, it still takes possession of pro-

ceeds derived by the tribes from sales of products, resources, and interests in lands of their several reservations and places them in IMPL accounts. Under the 1930 Act (25 U.S.C. §161b), it pays four percent interest on principal balances exceeding $500 in such accounts. Periodically, it credits the interest earned on these accounts to other accounts (interest accounts) on which it pays no interest. However, currently under the 1938 Act (25 U.S.C. §162a), the Secretary of the Interior is authorized to withdraw the funds in these accounts and invest them in a variety of Federal and Federal agency securities, and in certain private securities (*e.g.*, bank certificates of deposit).

For the last decade, investments authorized by 25 U.S.C. §162a have returned substantially more than four percent (and, appropos the interest accounts in the Treasury, substantially more than nothing). Recently, the Secretary has used this authority to invest virtually all Indian trust funds, including IMPL and interest on IMPL.

The government insists, however, that utilization of such investment authority to the benefit of the Indians is a matter of grace, and that it would breach no obligation owed if the Indians' funds were held in Treasury accounts producing substantially less, or nothing at all.

In a panel decision handed down four months before the decision in the instant cases, the court below held that the 1938 Act obligated the government to invest tribal trust funds, where such investments produce greater benefits for its cestui tribes. *Cheyenne-Arapaho Tribes v. United States*, 206 Ct. Cl. 340, 512 F.2d 1390 (1975).[1]

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[1]No distinction in principle can be drawn between the obligations of the 1918 and 1938 Acts.

[Footnote continued]

In the area of Indian property and affairs, the principle that duty (obligation) and power (authority) are concomitant is settled. Ninety years ago this Court iterated:

> . . . These Indian Tribes *are* the wards of the Nation. . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them . . . there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by the court, whenever the question has arisen. (Emphasis original) *United States v. Kagama*, 118 U.S. 375, 383-84 (1886).

Where the Executive is authorized by Congress to make Indian trust funds productive, it is not only obligated to do so, but where it has been provided with several means, to employ that which is most productive. *See Menominee Tribe v. United States, supra*, at 21.

4. The government's suggestion that, if the 1841 Act required the *investment* of "all funds held in trust", there would have been no need, in subsequent treaties, to have made specific provision for the productivity of the proceeds, and, in subsequent statutes, for the *payment of interest* on Indian trust funds in the Treasury, is specious.

Treaties are bilateral instruments. It is not surprising that some of them concluded after 1841 contained specific provisions for the productivity of the pro-

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In *Cheyenne-Arapaho*, the court below held that the government had breached obligations it owed as trustee, among other ways, by leaving the tribes' funds in accounts in the Treasury returning no interest, or interest at rates below yields obtainable from securities in which it was authorized to invest, and by refusing, out of concern for the management of its own budget, to invest in certain authorized securities which, at the time, would have produced the best yields. 206 Ct. Cl. at ____, 512 F.2d at 1393-1394.

ceeds.[2] Custom, convenience of negotiation, and desire of the tribes to have the whole bargain set forth in the instrument would dictate the continued inclusion of such provisions, regardless that in their absence the 1841 Act would have applied.[3]

Outside investment and the payment of interest on trust accounts in the Treasury were always recognized as separate and distinct means of providing for the productivity of trust funds.[4] The first statute of general application providing for the payment of interest on certain kinds of Indian trust funds in the Treasury was the Act of April 1, 1880, 21 Stat. 70 (25 U.S.C. §161). It was intended by Congress to provide a means of productivity alternative to that provided by the 1841 Act.[5]

---

[2]Some post-1841 treaties, as some earlier ones, provided for productivity of the proceeds by payment of interest, rather than by investment. *See, e.g.*, Treaties of February 28, 1831, July 20, 1831 and August 8, 1831 with the Seneca Tribe of Indians, 7 Stat. 348, 351, 355; Treaty of May 6, 1854 with the Delaware Tribe of Indians, 10 Stat. 1050; Treaty of May 17, 1854 with the Iowa Tribe of Indians, 10 Stat. 1070; Treaty of May 30, 1854 with the Kaskaskias, Peorias, Weas, etc., 10 Stat. 1084. The payment of interest, of course, is not authorized by the 1841 Act.

[3]The Act expressly stipulates that it applies only "when not otherwise required by treaty."

[4]The subject of how to deal with Indian trust funds engaged the attention of Congress for three years prior to adoption of the 1841 Act. *See, e.g.*, S. Jour., 25th Cong., 2d Sess. 331 (1838); S. Doc. No. 426, 25th Cong., 2d Sess. (1839); H.R. Rep. No. 892, 25th Cong., 2d Sess. (1838); H.R. Doc. No. 145, 26th Cong., 1st Sess. (1840); S. Doc. No. 116, 27th Cong., 1st Sess. (1841). Some believed then that their productivity should be provided for by placing them in accounts in the Treasury at interest. *See, e.g.*, 10 Cong. Globe, 27th Cong., 1st Sess. 441 (1841) (remarks of Senator Clay).

[5]*See, e.g.*, 40 Cong. Rec. 212-15, 719-20, 1514 (1880); S. Rep. No. 186, 46th Cong., 2d Sess. (1880).

[Footnote continued]

After 1841, in 1918 and 1938, Congress expanded the kinds of investments the Secretary was authorized to make of Indian trust funds to procure their productivity. But, from 1841 on, the statutes directing or authorizing the investment of such funds extended to all classes of them.

After 1880, *e.g.*, in 1929 and 1930, Congress expanded the classes of Indian trust funds that, in lieu of investing, the Secretary might place in interest-bearing accounts in the Treasury. But the statutes authorizing the payment of interest never did, and do not now, embrace all classes of such funds.[6]

To suggest, as the government does, that, had the 1841 Act been applicable to all Indian trust funds, the later acts providing for the *payment of interest* on trust funds in the Treasury would have been unnecessary, is to continue the confusion of apples and oranges that has characterized the government's position throughout this case.

Authority to make trust funds productive by outside investment is quite a different thing from authority to pay interest on funds in the Treasury. This case concerns only the former and does not involve the latter. The failure of the government and the court below to recognize the distinction is why petitioners are here.

The 1880 Act authorizes the Secretary of the Interior to deposit covered trust funds in interest-bearing accounts in the Treasury "whenever he is of the opinion that the best interests of the Indians will be promoted by such deposits, in lieu of investments."

[6]*E.g.*, as noted above, there is no statute authorizing the payment of interest on trust funds in the Treasury consisting of interest previously earned on principal trust accounts. Such funds may be made productive by investment, and virtually all presently are, under the 1938 Act.

Finally, if the government, when it unilaterally took possession of petitioners' funds, did not become subject to the obligation to make them productive for petitioners' benefit, then it cannot have been acting in the capacity of trustee. It cannot, at once, style itself a trustee and renounce the obligations of the office. Neither the government nor the court below has attempted to explain how, conformably to the Constitution, the government can have taken possession of petitioners' private funds without assuming the obligation, as trustee, to make them productive, or, as sovereign, to compensate for their use.

The notion that the no-interest rule somehow exempts the government as trustee of Indian funds from the obligation to make them productive, if allowed to be ensconced in the law by the decision below, will not only inflict great injustice on petitioners and the other Indian tribes having justifiable claims for past breaches of the obligation, but will encourage such breaches in the future. This notion is not only plainly wrong, but plainly pernicious. A writ of certiorari should issue to the Court of Claims so that it can be "extirpated and put to the torch."

Respectfully submitted,

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